

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK
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6 UNITED STATES OF AMERICA) 15CR142
7 vs.)
8 GREGORY WILLSON, ET AL.) Buffalo, New York
9 Defendant.) October 24, 2017
- - - - - X 1:15 p.m.

MOTION ARGUMENT

10 TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE ELIZABETH A. WOLFORD
12 UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

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THE CLERK: United States of America vs. Gregory

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Willson, et al, 15CR142EAW.

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THE COURT: All right. Good afternoon, everyone.

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MR. TRIPI: Good afternoon.

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THE COURT: So let's go through appearances.

19

MR. TRIPI: Joseph Tripi and Brendan Cullinane for

20

the United States. Good afternoon.

21

THE COURT: Good afternoon.

22

I'll call out each of the defendants, confirm if

23

the defendant is here and who is here on his behalf. David

24

Pirk is here.

25

MR. EASTON: William Easton from Rochester; and

1 Cheryl Meyers Buth.

2 THE COURT: Good afternoon. Andre Jenkins is
3 here.

4 MR. DEAL: Michael Deal and Herbert Greenman.

5 THE COURT: Timothy Enix.

6 MR. GRABLE: James Grable and Terrance Connors for
7 Mr. Enix. Mr. Enix waives his appearance.

8 THE COURT: Filip Caruso is here? Good afternoon.

9 MR. MOLLOY: John Molloy standing in for Mr.
10 Pieri, he is on vacation.

11 THE COURT: Thank you, Mr. Molloy. Jason
12 Williams.

13 MR. CATALANO: Joseph Catalano for Mr. Williams;
14 he waives his appearance.

15 THE COURT: All right. Thank you. Gregory
16 Willson.

17 MR. EOANNOU: Tom Eoannou for Gregory Willson,
18 present.

19 THE COURT: Thank you. Robert Osborne is here.

20 MR. BRAUTIGAM: Andrew Brautigam for Mr. Osborne.

21 THE COURT: Good afternoon. Mr. Stachowski.

22 MR. STACHOWSKI: I'm here and Mr. Olejniczak is at
23 the end.

24 THE COURT: Very good. Jack Wood.

25 MR. MOLLOY: Mr. Wood waives his appearance; John

1 Molloy on his behalf.

2 THE COURT: Thank you, Mr. Molloy. Thomas
3 Scanlon?

4 MR. DURLAND: Spencer Durland and Timothy Hoover;
5 and Mr. Scanlon is in the back.

6 THE COURT: Mr. Scanlon, I know you need to leave
7 for an appointment at some point, so whenever you need to
8 leave, feel free to do so.

9 Mr. Stacharczyck.

10 MR. OKAY: Mr. Stacharczyck is in the courtroom.

11 THE COURT: And McIndoo is here with Mr. Mahoney.

12 MR. MAHONEY: Present, Judge. Mr. McIndoo is in
13 the gallery.

14 THE COURT: We're here to deal with the various
15 pending severance motions. I'll state on the record what the
16 pending motions are and then we can deal with how we're going
17 to address them. So, Mr. Pirk has filed a motion to sever at
18 docket 435. He has filed a motion to change the trial location
19 at docket 434. And then yesterday he filed a supplemental
20 motion at docket 833, which I know the government responded to
21 today. Mr. Jenkins has filed a motion to change venue at
22 docket 522. And, in addition, he has filed his additional
23 severance motion at docket 792. And then this morning filed a
24 motion for joinder, and also seeking other relief at docket --
25 well, I don't have the docket number on what I printed out, but

1 it was filed this morning. Maybe, Lisa, you can file that
2 docket number for me and I can clarify it on the record.

3 Mr. Of Caruso's motion for severance was filed at
4 being docket 776; Mr. Woods docket 777; Mr. Olejniczak filed
5 his amended motion at docket 784; Mr. Willson filed at docket
6 782; Mr. McIndoo filed his motion at docket 783; Mr. Stachowski
7 filed at docket 785; and Mr. Osborne filed his motion at docket
8 787; and Mr. Enix filed his motion at docket 790; and Mr.
9 Scanlon filed his motion at docket 791. And, as I mentioned,
10 Mr. Jenkins filed his initial motion at docket 522, his second
11 motion at docket 792, and then the one from this morning was
12 filed at docket 836.

13 So, I guess, let me ask, from the government's
14 perspective, do you believe I've missed any of the pending
15 motions?

16 MR. TRIPI: I don't think so, Judge.

17 THE COURT: From the defense perspective, anything
18 that you think I've missed? No, okay.

19 Let's address the pending motions this way. First
20 of all, I know the government is now agreed that Mr. Caruso so
21 should be severed or its appropriate, you're not opposing his
22 severance?

23 MR. TRIPI: Correct.

24 THE COURT: Any defendant have an objection to Mr.
25 Caruso's severance? All right. So I am going to sever Mr.

1 Caruso from the rest of the case. My plan is, as I indicated
2 in the text order that I issued about a week ago, I would like
3 to communicate to you today what I'm going to do with all these
4 pending motions. My plan is to memorialize this, though, in a
5 written Decision and Order, because I think it's important to
6 be very clear as to why I'm doing what I'm doing. But I will
7 sever Mr. Caruso.

8 The government also has indicated that it doesn't
9 object to Mr. Willson --

10 MR. TRIPI: Williams.

11 THE COURT: -- Williams being severed, correct?

12 MR. TRIPI: Correct.

13 THE COURT: And I guess Mr. Williams, though, has
14 not filed a severance motion. Mr. Catalano, does Mr. Williams,
15 does he object?

16 MR. CATALANO: No, he does not.

17 THE COURT: He does not object.

18 MR. CATALANO: No.

19 THE COURT: Does any defendant object to Mr.
20 Williams being severed from -- being severed from, essentially,
21 the main case.

22 MR. DURLAND: I don't have an objection per se,
23 but I do think that, depending on the logic of the decision to
24 sever or not sever, it would, at least potentially, whether Mr.
25 Williams would be in a second trial or first trial, I'm simply

1 stating that I don't necessarily agree that Mr. Williams
2 automatically should be in trial No. 2. It really depends on
3 what rationale the Court is using to determine which defendant
4 goes in which group.

5 THE COURT: Fair enough. I can tell you right
6 now, I'm not persuaded by the defense arguments that the
7 so-called defendants who have alleged to have engaged in
8 violent conduct should be tried differently from the other
9 defendants. This is one indictment, it is one alleged
10 conspiracy. I don't view the defense arguments as persuasive
11 that, for instance, Mr. Scanlon's proposal as to how to divide
12 up this case. My view is we should have a main trial. The
13 question is going to be who is going to be part of that main
14 trial, and then we'll have another trial at some date after
15 that. So your objection, I guess, is on the record. But I'm
16 going to sever Mr. Williams as well from the main trial.

17 So, the additional defendant that the government
18 indicated it had no objection, I guess, to him being tried
19 with, if it comes to it, Mr. Caruso and Mr. Williams is Mr.
20 Wood. And, I guess, I'd like some explanation from the
21 government as to why Mr. Wood as opposed to any of these other
22 defendants?

23 MR. TRIPI: Yes, your Honor. That was a tougher
24 call, obviously. I framed our consent or however you want to
25 call it differently. Understanding that the Court might want

1 more than a group of two, so looking at who the rest of the
2 people were on the docket, you had individuals who had some
3 connection to the homicides either directly, indirectly, as
4 facilitators or obstruction after the fact.

5 THE COURT: Is your view that all of the
6 defendants except for Mr. Williams and Mr. Wood have some
7 connection to the homicide in one way or another? I mean, in
8 other words, is your view at this trial there is going to be
9 evidence of this homicide for all of the other defendants other
10 than Mr. Williams or Mr. Caruso and, I guess, Mr. Wood?

11 MR. TRIPI: Yes. The only thing where Mr. Wood
12 intersects with some of the Nomads that were charged with
13 subsequent acts of violence related to his van's use in a
14 drive-by shooting. So I viewed that as the easiest one to
15 sever and put in a secondary trial, for lack of a better term,
16 because there was really only one intersection. Now, there
17 would be testimony at both trials that his residence was used
18 as a clubhouse and certain meetings were had there, but, again,
19 that wasn't enough, in my view, to preclude being able to try
20 him in a smaller group within the same sort of time parameters
21 that I outlined up to four weeks for a secondary trial. I know
22 the Court posited in its inquiry to us, Mr. Stacharczyck, and
23 he would probably have been next on the list of people who
24 could be moved, but the difference there was there is a meeting
25 that occurs about a month after the homicides wherein a bunch

1 of Kingsmen members are meeting in the North Tonawanda
2 clubhouse with a couple other Kingsmen who had been subpoenaed
3 to testify in grand jury proceedings in state court and they
4 are sort of coaching the witness, and in going over what to
5 tell the grand jury, how to testify, things like that. Mr.
6 Stacharczyck is in that group and can be heard on that
7 recording making statements to the effect of, "I hammered him
8 already, but I will hammer him again," meaning I'll go over it
9 with Williams before he testifies. Williams, who is a
10 co-defendant here had been subpoenaed to the state grand jury
11 at that point in time. So the logic was that, to put all of
12 that in context, at least to some degree, any trial with
13 involving Mr. Stacharczyck, we need to get into the murders
14 because that is the point of the obstructive behavior.

15 THE COURT: But Mr. Williams, arguably, relates to
16 that, too?

17 MR. TRIPI: He does, but he is on the receiving
18 end of it in terms of the coaching as opposed to the driver of
19 the narrative kind of. So, if Williams is tried without
20 Stacharczyck, the same evidence very well may come in. And I
21 suppose the evidence of the homicide may not need to go in as a
22 great a detail, but it would need -- the fact that there was a
23 homicide and the fact they were subpoenaed would need to be
24 presented. So that is how I was grading them out. After
25 Stacharczyck, though, I don't see anyone that could easily be

1 put in a secondary group.

2 THE COURT: But the government would agree that
3 after Mr. Wood, Mr. Stacharczyck would be the next logical
4 person to try?

5 MR. TRIPI: I would think so.

6 THE COURT: If, in fact, hypothetically, I were to
7 sever Mr. Caruso, Mr. Williams, Mr. Stacharczyck and Mr. Wood,
8 what is the government's ballpark estimate as to the length of
9 that kind of trial?

10 MR. TRIPI: Probably on the low end between two
11 and a half, three weeks; and on the high end, five weeks. That
12 is my best guess right now, looking through the crystal ball,
13 five, six at the highest end. On the lowest, maybe two and a
14 half weeks.

15 THE COURT: Mr. Molloy, does Mr. Wood object to a
16 severance along those lines with either Mr. Williams or Mr.
17 Caruso or also Mr. Stacharczyck?

18 MR. MOLLOY: No, your Honor, he won't.

19 THE COURT: Mr. Okay, what is Mr. Stacharczyck's
20 view of this? If you want to talk to your client before
21 answering that is fine?

22 MR. OKAY: I would like to talk to him.

23 MR. TRIPI: I would add, too, of those, Williams,
24 Caruso, Stacharczyck and Williams at one point.

25 THE COURT: Williams, Stacharczyck, Wood and

1 Caruso.

2 MR. TRIPI: Right. Williams, Stacharczyck and
3 Caruso, three of the four, also were all members of the same
4 West Side Chapter at the same point, the proof of those drug
5 premises and those overt acts would overlap.

6 THE COURT: Is there any other defendant that was
7 a member of that chapter, the West Side Chapter?

8 MR. TRIPI: No, your Honor, other than the
9 deceased, no.

10 THE COURT: Okay. Mr. Okay, I'll give you a
11 chance to talk to Mr. Stacharczyck.

12 MR. OKAY: Thank you.

13 MR. TRIPI: Did the Court indicate Wood would be
14 severed?

15 THE COURT: I haven't.

16 While Mr. Okay is out, let me ask a question that
17 doesn't apply, Mr. Tripi, to his client and that is, I believe
18 the government is taking the position that any one of these
19 defendants, whether it be Mr. Scanlon, Mr. Osborne, even if we
20 were to split it up, let's say, into two additional trials in
21 addition to this third, are you suggesting to me that each one
22 of those defendants would take along the lines of this 10 to 14
23 weeks to try the case?

24 MR. TRIPI: Are you saying a single-defendant
25 trial?

1 THE COURT: Let's say a single defendant trial.
2 Let's say I was to try Mr. Scanlon on his own or even Mr.
3 Osborne and Scanlon on their own, I can't imagine that each one
4 would be four months.

5 MR. TRIPI: No. But, individually, each one would
6 be a multiple-week trial in their own right, so it depends on
7 how many trials the Court would want. Obviously, I'm opposing
8 it, for argument's sake, to try Mr. Scanlon alone or Mr.
9 Osborne. Those are a couple-week propositions each defendant.

10 THE COURT: But one of the instructions that I
11 understand the Second Circuit to give judges in cases like this
12 is to look at the extent to which carving out one or more
13 defendants would reduce not only the length of the so-called
14 main trial, but also result in a second trial that isn't going
15 to be as lengthy. And is there any other defendant that could
16 be severed out from the main trial, as far as the government's
17 concerned, that would accomplish that objective?

18 MR. TRIPI: Judge, I really don't believe so.
19 Because, as you look at, for instance, you're using Scanlon and
20 Osborne as examples, their conduct is obstruction and accessory
21 after the fact as charged to the murders. We're really going
22 to be getting into the depths of the murders. As you recall
23 from detention arguments and other arguments, they are both
24 connected to the Olean clubhouse which was integral before and
25 after to the murders. So those two would be essentially

1 repeating, to a large degree, the homicide trial and their
2 connection to the Olean chapter. In addition to the other
3 aspects of the conspiracy that delved beyond the role of the
4 conspiracy, the acts of the nomads, same thing, there are
5 violent acts to the other group that goes to the heart of what
6 culminates in these murders, so to take that out of the heart
7 of the case, that conception and chronological void would still
8 need to be filled, whether the Nomads who did other shootings
9 and violent acts are in the trial or not, you have to explain
10 that stuff, otherwise it's disjointed.

11 You have Pirk in charge and the murders happened,
12 there is a lot of stuff that happened in the middle that the
13 other defendants do in the course of that build up to the
14 murders. And then the people who covered it up or obstructed
15 after the fact. If you don't have the lead up, the murders
16 makes no sense and then the cover up makes no sense. So from
17 our vantage point, it really would very much be repeating the
18 same trial. Once you get past some of these other defendants
19 who I believe we could manage and have say an 8/4 split; even.
20 A main trial and a secondary trial or something along those
21 lines. But I think once we get much beyond Mr. Stacharczyck
22 here, we're, yeah, sure, could a second trial be eight weeks
23 and the main trial be twelve weeks? Probably. So I don't know
24 if that achieves the goal of the Court. Though it still ties
25 the Court's calendar up for 20 weeks instead of 12. So --

1 THE COURT: Okay. Mr. Okay, what is Mr.
2 Stacharczyck's position?

3 MR. OKAY: He would have no objection to being
4 severed, your Honor.

5 THE COURT: Thank you. I'll be very up front with
6 what I'm thinking of doing and that is to sever, obviously I've
7 indicated of severing Mr. Caruso and Mr. Williams. And my plan
8 or my thought is that I should also sever Mr. Stacharczyck and
9 Mr. Wood. So we would have four defendants who are outside of
10 the main defendant trial, which leaves us with eight
11 defendants. I know we have an issue with Mr. Jenkins and the
12 appeal that is pending, I want to hear argument about that.
13 But I want to also hear from all of the remaining defendants
14 who would be left in this eight-defendant main trial as to why
15 you believe that that is not workable or what I'm proposing to
16 do doesn't make sense. So, my suggestion is, save the argument
17 regarding Mr. Jenkins and then also the argument about the
18 location of the trial for the end of this, and let's deal with
19 the remaining seven defendants who I'm proposing to try as part
20 of the main trial.

21 One of my views of this, or, I guess, how I am
22 approaching this is related to who are the defendants in
23 custody, and then, in addition to that, I don't see that you
24 can try Mr. Pirk without Mr. Enix. And I don't see that you
25 can try Mr. Scanlon without Mr. Osborne. And so the eight

1 defendants who are left would basically be all of the
2 defendants who are in custody, plus Mr. Pirk -- or Mr. Enix and
3 Mr. Scanlon. Am I misstating any of that, Mr. Tripi?

4 MR. TRIPI: No, your Honor.

5 THE COURT: But if Mr. Scanlon, you want to make
6 the argument first, I know he is here and has to leave soon.

7 MR. DURLAND: Your Honor, thank you. Certainly
8 the other defense counsel can address their clients, but we
9 discussed that I would, at first, discuss why it is that, you
10 know, I think an 8/4 split that your Honor is proposing is both
11 impractical and I don't think serves the purposes of severance
12 and joinder that your Honor correctly described just a moment
13 ago. And, really, I think what we're talking about at this
14 point is should Mr. Scanlon and Mr. Osborne go in this second
15 trial or with the --

16 THE COURT: Would you agree that logistically that
17 Mr. Osborne and Mr. Scanlon need to be tried together or should
18 be tried together?

19 MR. DURLAND: I don't necessarily agree with that,
20 your Honor, because to be sure, they both have this connection
21 to the Olean clubhouse. That is really a superficial
22 connection that doesn't translate to the types of concerns of
23 the cases that discuss joinder and severance are talking about.
24 And you could always come up with superficial reasons why one
25 defendant or another defendant is related to, say, the

1 homicides. And let me take Mr. Tripi's point about, well,
2 Scanlon and Osborne are both connected to the homicides after
3 the fact, and, therefore, all of the evidence with respect to
4 the homicides is going to have to come in. First off, Mr.
5 Scanlon is not charged with being an accessory after the fact,
6 that is Mr. Osborne only. In that respect, the two defendants
7 are different. And certainly if your Honor is concerned about
8 pretrial incarceration, moving Mr. Scanlon to the second trial
9 while Mr. Osborne is in the first would make sense on that
10 measure, also, although Mr. Osborne is in the best position to
11 decide whether he would prefer severance or a speedier trial.
12 But in terms of whether all of the evidence of the murders is
13 going to be necessary, I emphatically disagree with that.
14 Certainly the Second Circuit in *Casamento* and the district
15 court in *Gallo* both discuss the fact that generally does not
16 happen in practice and that --

17 THE COURT: But I have the government, the party
18 that is going to be responsible for trying to meet its burden
19 of proof telling me that, in fact, yes, this is part and parcel
20 of our evidence, why should I be persuaded by your argument
21 that, no, that is not going to be the case?

22 MR. DURLAND: Well, you should be persuaded by my
23 argument, your Honor, because much of that evidence is going to
24 be inadmissible. I'm not talking about the government not
25 choosing not to present that evidence. I am talking about,

1 just as in *Nessaro*, the inflammatory details of the homicides
2 and the extensive evidence of Mr. Jenkins movements prior to
3 the murders.

4 THE COURT: But this is all part of the alleged
5 conspiracy. In other words, the allegations and they are
6 allegations, that is all they are here, but the allegations are
7 that the Kingsmen Motorcycle Club were protecting its own and
8 protecting people jumping patch and because of that and part
9 and parcel they engaged in all sorts of violence and ultimately
10 murder.

11 MR. DURLAND: That is certainly what the
12 allegations are and that is true for all of the defendants.
13 What we need to do here is understand the practical limitations
14 of this courtroom and the practical limitations --

15 THE COURT: Don't worry about the practical
16 limitations of the courtroom. We'll make adjustments to the
17 courtroom to accommodate as many defendants we need to in
18 trial.

19 MR. DURLAND: And I was going to say, in addition
20 the practical limitations to the juror every time you add and
21 additional defendant to the juror, the complexity of the
22 limiting instructions the Court has to give increases. The
23 need that jurors need to retain as to what to disregard with
24 consider, just overt ct No. 1, Defendant Willson is accused of
25 striking victim A, several times you would have to say,

1 "jurors, that is admissible against Mr. Willson."

2 THE COURT: Why is it admissible against only Mr.
3 Willson -- let me finish. It's part of the alleged conspiracy.

4 MR. DURLAND: What I was going to say, your Honor,
5 was it's admissible against Mr. Willson, not for propensity
6 purpose. You would have to give the instruction because the
7 jurors would not be able to use that evidence that, oh, Mr.
8 Willson is a violent guy, the other substantive offenses with
9 which he is charged must necessarily have been committed. You
10 have to give that instruction. There is no allegation that Mr.
11 Scanlon had joined the KMC at this point in time, 2009. You
12 would have to say disregard that evidence with regard to Mr.
13 Scanlon and anybody else that is not alleged to be part of the
14 club at that time. And with everybody else, you have to say,
15 consider this one overt act of the many that are alleged, you
16 have to say you have to consider this to establish the
17 conspiracy and you can consider this to establish the
18 enterprise, but not for any other purpose.

19 THE COURT: Taking your argument to its logical
20 conclusion, though, you would be separating out each defendant
21 to be tried separately.

22 MR. DURLAND: No, that's not true, your Honor.
23 What I'm trying to say is I'm trying to illustrate the ways in
24 which adding defendants increases the practical burdens on a
25 juror and --

1 THE COURT: The defendants are added, though.
2 Keep in mind, Mr. Scanlon's memo, I think, makes the argument
3 that somehow the government hasn't proven the need to try
4 everybody together. I can't remember the exact language. But
5 the presumption is they all or should be tried together. There
6 has to be a reason not to try them together, such as
7 antagonistic defenses, such as *Bruton* issues. But this
8 argument that I'm having trouble accepting the notion that
9 somehow trying eight defendants together versus five defendants
10 together is really going to significantly change the hurdles
11 and burdens that will be faced in trying this case.

12 MR. DURLAND: Let me try to convince you that that
13 is not correct, your Honor. What we've tried to describe in
14 our papers, and I'll try to make it clearer now is it's not
15 just this differential between violence, defendants who are
16 personally accused of violent conduct and are not, I do think
17 that is significant. But what is also the case is the nature
18 of the allegations of the defendants that we would put in the
19 group B trial, so it's the four that your Honor is
20 contemplating of severing, Scanlon and Osborne, those are very
21 streamlined charges, the conspiracy, guns, drugs and with
22 respect to Scanlon and Osborne and according to the
23 Government's papers, Stacharczyck obstruction after the fact
24 that is it a limited scope which would make that second trial,
25 I think, quick, clean and far less complicated than the main

1 trial that your Honor is contemplating, which has that it is
2 not just that these other alleged acts are violent, they are,
3 but they are also extraordinarily complicated.

4 THE COURT: So Mr. Scanlon has to objection to
5 being tried with Mr. Caruso?

6 MR. DURLAND: That's correct. In our reply, we
7 proposed that Mr. Scanlon be tried alongside Mr. Caruso.

8 THE COURT: How is that not, especially with Mr.
9 Osborne, who is alleged to have been an accessory after the
10 fact to a murder allegedly committed by Mr. Jenkins, and how is
11 that not going to have a potential antagonistic defense?

12 MR. DURLAND: We're not raising a defense against
13 antagonistic defenses. I believe that they typically need to
14 be contrary, such that the jury, if they believed one
15 defendant, they would have to necessarily disbelieve the second
16 defendant. I don't think the potential defense theories put
17 forth by Mr. Scanlon and Mr. Caruso are quite so diametrically
18 opposed that that would apply, but you're certainly right that
19 defendant Caruso is accused of violent conduct that is somewhat
20 different than Mr. Scanlon, Osborne and the others who are in
21 group B, but I think his presence in group B is really just a
22 function of the fact he can't be with Jenkins, or, excuse me,
23 with Pirk and Enix in group A. So we simply have to accept the
24 fact that that is not a perfect severance, there will be some
25 spillover prejudice that group B suffer, and they have to

1 accept that as the price that society demands for efficient
2 trials. What I'm hoping to convince the Court of is when your
3 Honor talks about there needs to be some reason that justifies
4 a severance, really what we're talking about is should we
5 forego the benefits of a single joint trial. Once a severance
6 argument is being made, you've already lost some of the
7 benefits of a single joint trial. And then when, as is true in
8 this case, the efficiency to be gained in the severance are the
9 same or at least very similar with a six/six split as opposed
10 to an eight/four split, then it makes perfect sense and is the
11 perfectly consistent with the purposes underlying the several
12 rules that apply to severance and joinder to move Mr. Scanlon
13 and Mr. Osborne to the group B trial. In that case, you would
14 have a natural dividing line between the defendants, the tier
15 two defendants, the four that your Honor has mentioned and then
16 Mr. Scanlon and Mr. Osborne, and then the remaining six
17 defendants who are accused of a much broader array of conduct.
18 And, your Honor, this is very similar to what the district
19 court did in *Gambino*. Thereto, there were 12 defendants, and
20 the Court decided, when I look at the purposes of severance and
21 joinder, a reasonably even split is best designed to serve
22 those purposes. And the Court split 7/5, the five defendants
23 in the first trial were those who were accused of the most
24 violent conduct, and those who were in group B in the Gambino
25 trial for seven defendants who were mostly involved in the.

1 THE COURT: One thing you haven't mentioned at all
2 is having to have witnesses and victims testify repeatedly.
3 And what I hear the government saying is that if Osborne
4 Scanlon are tried separately from Pirk, Enix, Jenkins, McIndoo
5 and others, that the same witnesses and the same alleged
6 victims are going to have to testify. And that is not
7 necessarily the case with Caruso, Stacharczyck, Williams and
8 Woods.

9 MR. DURLAND: Well, your Honor, I'm not sure which
10 victims would need to be testifying multiple times in that
11 scenario in which Scanlon and Osborne are in group B. I
12 haven't heard the government describe who that might be. And
13 in terms of more broadly the repetition of witnesses, I would
14 urge your Honor to question whether it's really true that
15 simply because someone is accused as an accessory after the
16 fact, say, in Mr. Osborne's case, that that means all of the
17 witnesses necessary to prove the government's allegations that
18 Mr. Jenkins is guilty of the homicides and that Mr. Pirk
19 ordered them, that all of those witnesses would also be
20 necessary. I submit to your Honor that that simply is not the
21 case. Much of that evidence would be excluded as cumulative or
22 be excluded under 403. It's simply far more prejudicial.

23 THE COURT: You say much of it would be excluded.
24 Whether or not something is excluded under 403 is ultimately a
25 discretionary of the Court, so it's a bit presumptuous to

1 assume that something is going to be excluded because it's
2 cumulative or unprejudicial, the Court has to balance concerns
3 expressed by 403. I think it's far too premature to anticipate
4 what, if anything, will be excluded under 403 in this trial.

5 MR. DURLAND: I disagree with that, your Honor.
6 And these were central considerations of the Gallo court and
7 Gambino court.

8 THE COURT: But, again, they are discretionary of
9 the trial court. Because another trial court made a
10 discretionary determination has absolutely no binding authority
11 on me. Certainly I can look at it and it's persuasive, each
12 case is different, each alleged conspiracy is different, each
13 alleged defendant is different in how they fit into the
14 conspiracy.

15 MR. DURLAND: It's certainly true that your Honor
16 is not bound by the evidentiary decisions in an entirely
17 different case, but the point I'm making is the fact that the
18 government is not entitled to introduce unlimited enterprise
19 evidence is a consideration that those courts took into account
20 when making a severance determination. Neither of those courts
21 said, well, I don't have anyway to know in the future whether a
22 particular piece of evidence will be excluded or not,
23 therefore, I'm simply going to assume that all of this
24 evidence, because it's technically relevant under 401 to the
25 enterprise element, I'm going to assume all that evidence is

1 going to come in. I don't think that that is an appropriate
2 presumption for the Court to make.

3 If the basis for the government's assertion is
4 that all of the murder evidence is going to come in for the two
5 defendants, and, therefore, we're simply going to be
6 replicating all of that evidence in the two separate trials and
7 that is a waste of resources, then I don't understand the
8 government's in a trial of Wood Williams and Caruso because the
9 murder evidence is just as relevant under 401 to the enterprise
10 and conspiracy elements against those three defendants and yet
11 the government has agreed that the murder evidence would be
12 considerably less in those trials. I submit to the Court that
13 it would be just as streamlined of a murder case if you added
14 Mr. Scanlon and Mr. Osborne to group B. Granted, Mr. Osborne
15 is charged with being an accessory after the fact, but that
16 charge really relates more to what Mr. Osborne did and what he
17 knew. The same is true of the general obstruction count
18 against Mr. Scanlon, which includes a reference to the
19 obstruction of the murder investigation and does not require
20 the coroner to testify about what happened. I suspect that
21 there is going to be very little, if any, dispute that the two
22 -- the two decedents were, in fact, shot and killed. That is
23 not going to be an issue in the group B trial. And I stand on
24 my argument, your Honor, that because much of that evidence is
25 not going to be admissible against these two defendants, I

1 don't think it's accurate to say that this is just going to be
2 replicated trials. And if that were really true, the
3 government would not have conceded that the murder evidence in
4 the four defendant group B trial would be considerably less.

5 THE COURT: All right. And just so I'm clear,
6 because I think, initially, Mr. Scanlon's proposal had been to
7 have Mr. Caruso part of the so-called group A, but in reply you
8 agreed that because of antagonistic defense issues with Pirk
9 and Enix, and potentially Jenkins, that he could be tried with
10 your group, group B?

11 MR. DURLAND: That's correct, your Honor. I think
12 it's a *Bruton* and confrontation clause issue, but certainly,
13 yes. In reply we said, in light of the government's argument
14 about accepting defendant Caruso in group B, and in light of
15 the government's argument with respect to the certificate of
16 conviction which I know others are going to get into, we
17 modified our proposal, it was really something that we had
18 contemplated in a footnote in our main motion and we simply
19 carried that out in the reply. So what we are proposing, your
20 Honor, is the four defendants that you have indicated should be
21 in a second trial along with Mr. Scanlon and Mr. Osborne.

22 THE COURT: Okay. Thank you.

23 MR. DURLAND: Thank you, your Honor.

24 THE COURT: Let me hear from Mr. Osborne's
25 attorney, because, come on up to the podium, Mr. Brautigam.

1 DEFENDANT WILLSON: Your Honor, are we allowed to
2 go to the bathroom?

3 THE COURT: Yes, you are. Mr. Olejniczak, too.
4 Do you have an envelope. You want it to go to me. I can't
5 take it directly. Give it to your attorney and I'll ask your
6 attorney to give it to me.

7 Mr. Willson was the first one went out.

8 THE COURT: Mr. Brautigam.

9 MR. BRAUTIGAM: Yes.

10 THE COURT: So one of the main questions I have
11 for you what Mr. Scanlon's counsel is proposing Mr. Osborne be
12 tried second and Mr. Osborne is obviously in custody and that
13 is one of my concerns is one of the reasons that I split up the
14 pretrial motions with Judge Roemer in the case so we could move
15 it along quicker than everyone was indicating these cases
16 typically move. And what is Mr. Osborne's position with
17 potentially not trying this case for another year?

18 MR. BRAUTIGAM: He has no objection if he were to
19 be severed. His circumstances have changed significantly since
20 the time of his arrest and incarceration. So, as a kind of
21 practical concerns have diminished at least somewhat in terms
22 of him being incarcerated in pretrial detention awaiting a
23 trial.

24 THE COURT: And does Mr. Osborne agree that he
25 then should be tried in a second group with the four defendants

1 who I had referenced earlier?

2 MR. BRAUTIGAM: Yes, your Honor.

3 THE COURT: And he has no objection to being tried
4 with Mr. Caruso.

5 MR. BRAUTIGAM: No, your Honor.

6 THE COURT: Anything else you want to argue on
7 this point?

8 MR. BRAUTIGAM: Of course, Mr. Durland presented
9 an excellent argument. In the murder trials that I have been a
10 part of, the nuts and bolts of the murder itself, the most time
11 consuming portion of the proof and I don't think that all of
12 those nuts and bolts would be relevant to the Court's
13 discretion, of course, even admissible against Mr. Osborne. I
14 think that having the trial groups as we have been discussing
15 would significantly streamline the evidence, of course,
16 pursuant to the government's intentions and the Court's
17 rulings.

18 THE COURT: Okay. Thank you, Mr. Tripi. You want
19 to respond? It may be helpful to hear the government's
20 response to this before we hear from additional Defense
21 Counsel.

22 MR. MAHONEY: Is it okay if I sit with my client
23 for a minute?

24 THE COURT: Sure.

25 MR. TRIPI: I'll clear the way so they can return.

1 THE COURT: Okay.

2 MR. TRIPI: Judge, I respectfully disagree with
3 opposing counsel's points. At the outset, I would note I
4 didn't hear one thing that triggered their burden to show you
5 that a specific trial right would be substantially prejudiced
6 by a joint trial as the one that is being considered here at
7 the moment. With respect to overt acts that don't directly
8 implicate a particular defendant as your Honor noted in your
9 comments, this is a conspiracy case, the Courts presumed those
10 to be properly joined. These defendants were part of an
11 enterprise. So, for example, awareness that another individual
12 in the enterprise were engaged in certain acts would be
13 evidence against those who didn't. The government will have to
14 prove that a defendant knew that a conspiracy extended beyond
15 their individual role. So, for example, the facts of -- Mr. --
16 excuse me -- Mr. Willson visiting multiple Kingsmen Clubhouses.

17 THE COURT: Mr. Willson?

18 MR. TRIPI: For example, Mr. Willson's overt acts
19 1 through 10, visiting different KMC clubhouses in
20 Pennsylvania, beating a woman, engaging in that activity and
21 then hiding her at her mother's house, there will be evidence
22 that other Kingsmen members knew of this conduct and it was not
23 reported to the police, so that type.

24 THE COURT: I guess that, but what about
25 specifically this argument with respect to Mr. Scanlon and Mr.

1 Osborne, because let's face it, we can accommodate as many
2 defendants as we need to within reason within this
3 courtroom, but clearly from a just a numerical standpoint
4 splitting a trial of 12 defendants into six and six or
5 somewhere along those lines seems as though it would be more
6 streamlined, why would that be not true?

7 MR. TRIPI: On the face of it, I would agree.
8 When you look at this particular case and this conspiracy, that
9 is where that analysis starts fall apart. Starting with Mr.
10 Mr. Scanlon, who were the three highest ranking Kingsmen
11 members at the time the murders at the time of this case. The
12 indictment sets out the chain of command. Well, the three
13 highest ranking for members when the murders were committed were
14 Pirk Enix and Scanlon. So that is that. So what defense
15 counsels' arguments ignores that among the predicate acts of
16 racketeering are acts involving murder and also acts of
17 obstruction of justice, those are predicate racketeering
18 activities. So the activities of Osborne in deleting video and
19 others underneath Scanlon are applicable to Scanlon. In
20 addition to that, as I have argued before, the individuals who
21 were directly involved in the murder came to the Olean
22 clubhouse, with Mr. Scanlon's awareness that they were there,
23 with Mr. Osborne's awareness that they were there. That was
24 the hub location from which the events of that week leading
25 into the murders launched from.

1 Then, Mr. Jenkins, as I argued previously, goes on
2 his mission as his undercover operative trying to infiltrate a
3 rival club, all the while reporting back to and being in
4 contact with Mr. Pirk, and also being in contact with the
5 individual who has a ranking Kingsmen, also subordinate to Mr.
6 Scanlon who is also turning around and having phone
7 conversations with Mr. Scanlon.

8 THE COURT: Not a named defendant?

9 MR. TRIPI: Not a named defendant, a trial
10 witness. So there are streams of communication going directly
11 from Jenkins to Pirk telephonically and in-person meetings as
12 well as from Jenkins and the witness traveling with Jenkins to
13 the other Kingsmen, ranking Kingsmen members in Olean, who is
14 turning around and having extensive phone conversations with
15 Mr. Scanlon. And as I argued before, after the murders occur,
16 Mr. Jenkins returns to the Olean clubhouse and during that, if
17 you do the math, during that portion in time when Mr. Jenkins
18 is getting lost on his motorcycle and being captured on videos
19 and trying to figure out to where to flee post execution of the
20 victims, he ends up back at Olean -- there is a corresponding
21 phone call between Mr. Pirk and Mr. Scanlon, at that precise
22 point in time where this individual, the clubhouse is already
23 locked down, yet Jenkins is allowed in. And then his clothes
24 get burned with the assistance of uncharged subordinate to Mr.
25 Scanlon and subordinate to Mr. Osborne, Kingsmen from the Olean

1 chapter and then monies are acquired for Mr. Jenkins to get out
2 of town. And there is assistance from that personnel at that
3 chapter there. Now, Mr. Osborne is charged specifically with
4 accessory after the fact for deleting video. There will be
5 testimony that Mr. Scanlon and Mr. Pirk, essentially, made
6 comments that precipitated the deletion of the video.

7 THE COURT: Let me ask you a question. From the
8 government's standpoint, is Mr. Scanlon and Mr. Osborne's
9 alleged conduct more related to Mr. Pirk's, Mr. Jenkins, Mr.
10 Enix's alleged conduct than Mr. Olejniczak and Mr. McIndoo? Do
11 you understand my question?

12 MR. TRIPI: I'm processing it. I think so. Yeah.
13 To answer your question shortly and directly, yes.

14 THE COURT: If, in fact, I did what Mr. Scanlon
15 and Mr. Osborne want me to do and grouped them with the other
16 four defendants that were initially referenced, ballpark
17 figure, how much time are you anticipating that so-called group
18 B trial would be?

19 MR. TRIPI: I believe that injects, Mr. Durland
20 was saying, well, I don't know, that injects all of the
21 testimony from the murders into that trial. Because you have
22 people who were a person or persons who were traveling with Mr.
23 Jenkins, who were deleting or helping burn clothing, and then
24 the testimony about the deleting the video, all of that, that
25 is a big portion of the murder testimony in and of itself. So

1 that injects all of that into the secondary trial. Whereas, I
2 could probably cover the fact that that happened with one or
3 two witnesses who would necessarily be testifying anyway in the
4 second trial as opposed to relitigating all of that and
5 bringing all of those witnesses back for this Caruso led trial,
6 secondary trial.

7 THE COURT: Okay. Anything else, Mr. Tripi, in
8 response to the arguments from Mr. Scanlon and Mr. Osborne?

9 MR. TRIPI: Just that Mr. Scanlon maintains
10 contact, it's not just the murder, he maintains telephonic
11 contact with Mr. Pirk through the time of grand jury testimony
12 and subsequent to seminal events that are occurring in the real
13 world, like recovery of the firearm, there are conversations
14 over the phone. Despite the fact one is in New York and one is
15 in Florida. Grand jury subpoenas being issued to Kingsmen.
16 There are extensive phone contacts, other things in the real
17 world, there are extensive communications over 20, 30, 40
18 minutes that are counterintuitive to, "hi, how you doing,
19 haven't seen you in a while." So you will have, that is
20 extensive phone record analysis linking those two would be in
21 both trials. Kind of nitty gritty sort of boring, methodical
22 testimony will be duplicated twice.

23 THE COURT: Okay thank you.

24 MR. DURLAND: Judge, may be heard?

25 THE COURT: Sure.

1 MR. DURLAND: Briefly, I want to reiterate a
2 couple of points here. First, we're already going to sever.
3 So this idea about, well, they haven't met their burden to
4 justify a severance in the first place, I think your Honor's
5 question was spot on. Why, when we're already severing, why
6 would we not not -- why would we deny the benefits.

7 THE COURT: I think if I were to say to the
8 government, okay, we're splitting this six and six, and you got
9 to decide who are the two additional who are going to be tried
10 with the four that I mention, you correct me if I'm wrong, I
11 think you would be electing Mr. McIndoo and Mr. Olejniczak.

12 MR. TRIPI: To go with the four.

13 THE COURT: Caruso, Williams, Wood and
14 Stacharczyck.

15 MR. TRIPI: I would think that is correct.

16 MR. DURLAND: That very well may be true, but that
17 doesn't mean that that decision actually furthers the
18 legitimate purposes of severance and joinder. Certainly it's
19 in the government's best view to stick the defendants with very
20 little evidence or very little violence against them.

21 THE COURT: That is not what I hear the
22 government, saying though. What I hear the government saying,
23 and I have to rely on what the government is saying to me are
24 going to be the witnesses with respect to the evidence that it
25 intends to prove and what I hear the government saying is our

1 proof is going to substantially overlap between Jenkins, Pirk,
2 Enix, Scanlon, Osborne and Osborne.

3 MR. TRIPI: Yeah.

4 MR. DURLAND: Your Honor, we also heard the
5 government saying --

6 THE COURT: I guess Mr. Willson.

7 MR. DURLAND: You've also heard the government
8 saying there would be duplicative evidence in both trials,
9 therefore, there should be no severance whatsoever. The
10 government later said Caruso and Williams, I guess the evidence
11 would be less. In response to your Honor's text order, well, I
12 guess the murder evidence against Mr. Wood would also be
13 sufficiently streamlined as well. And my point is you can
14 always point the six degrees of separation game with any of the
15 defendants.

16 THE COURT: What about the fact that Mr. Scanlon,
17 according to the government, was the third highest ranking
18 member of the Kingsmen at the time of the alleged murders?

19 MR. DURLAND: I'm glad you pointed that out. I
20 think that is a perfect example of a fact that has a
21 superficial connection between Mr. Scanlon and Pirk and Enix
22 but has absolutely nothing to do with the purposes of severance
23 and joinder, I completely fail to understand.

24 THE COURT: But it does when you are alleging that
25 you have a conspiracy that an intrinsic part of it was the

1 order of direction and the rank and file of each one of these
2 members, and, of course, the leaders are naturally joined
3 together. I mean the government's allegations, I mean the
4 indictment clearly goes through the fact that the way the
5 Kingsmen organization was set up was so that directions came
6 from the top down. So, if you take out the third-ranking
7 member from that trial proof, that seems as though it's a
8 pretty big gap.

9 MR. DURLAND: Your Honor, you're not taking him
10 out of the trial proof. It's not as if the jury of group A --

11 THE COURT: If you're not taking him out of the
12 trial proof, how does it possibly make it more efficient to
13 separate them out?

14 MR. DURLAND: Because, your Honor, there is a
15 difference between making no reference to Mr. Scanlon
16 whatsoever and needing to present significantly less evidence
17 against Mr. Scanlon in group A when Mr. Scanlon is not a
18 defendant in that case. And I think the broader point here is
19 something like Mr. Scanlon's rank, that, your Honor makes the
20 comment that it's related to the conspiracy, but that is true
21 for all of the defendants. No one is saying, at least
22 certainly Mr. Scanlon is not saying, that these defendants are
23 improperly joined. Our argument here is about how the
24 defendants should be allocated, now that the decision has been
25 made to sever, how those defendants should be allocated in

1 order to serve the purposes of severance and joinder. Consider
2 the Williams and Stacharczyck, both of whom the Court has
3 indicated that it is willing to sever and the government has
4 said, well, the murder evidence against those two defendants
5 will be considerably less. Mr. Stacharczyck is alleged to
6 have, and Mr. Williams, are both alleged to be at the North
7 Tonawanda clubhouse at the scene of the alleged murders. Mr.
8 Williams is alleged to have contact with an eye witness and Mr.
9 Stacharczyck, the papers describe all of this, Mr. Stacharczyck
10 is accused of obstructing the investigation afterwards with
11 respect to Mr. Williams himself and with respect to some of the
12 eye witness, and so the point that I'm trying to make is, yes,
13 you can draw superficial connections between the various
14 defendants, but the point is why is it that these groups
15 shouldn't be evenly balanced and that the murder proof in
16 particular, but certainly the other proof as well, the evidence
17 about all of these other violent episodes, everything that you
18 heard Mr. Tripi say about why that all this proof is going to
19 be injected back in, it all has to do with the conspiracy
20 and the enterprise that is true with every single defendant and
21 Mr. Tripi has conceded that the proof against the other
22 defendants would be significantly less, a two to four-week
23 trial, it can't possibly be the case that the proof against Mr.
24 Osborne and Mr. Scanlon would be orders of magnitude greater
25 when the rationale that the government is offering for

1 admitting this evidence is the same enterprise and same
2 conspiracy that is charged against Mr. Scanlon, Mr. Osborne,
3 Caruso, Wood, Williams and Stacharczyck. All of those
4 defendants, your Honor, naturally fit within the second group
5 and we submit they ought to be tried together.

6 THE COURT: Thank you.

7 MR. DURLAND: Thank you.

8 THE COURT: Let's hear from another defendant.
9 Want to hear from Mr. Enix.

10 MR. GRABLE: On behalf of Mr. Enix, Mr. Connors
11 and I would rely on our papers and submissions.

12 THE COURT: Mr. Mahoney, anything you want to add?

13 MR. MAHONEY: No, I do think that Mr. McIndoo
14 should be in the second group, Judge, but I don't need to
15 amplify that. I said in my papers I may have something to add
16 at a later time based upon certain factual allegations. I'm
17 not doing it now.

18 THE COURT: Let me ask this. I know Mr. Jenkins'
19 counsel has raised certain *Bruton* issues, I didn't see any of
20 those issues raised by any other defendant. Is it fair to
21 state, at least at this time, no other defendant is aware of
22 any *Bruton* issues that would necessitate a severance?

23 MR. MAHONEY: Not from me, your Honor.

24 THE COURT: Any other defense attorney disagree
25 with that? No? Okay.

1 What about Mr. Stachowski?

2 MR. STACHOWSKI: I was leading toward the second
3 group. There is not one thing that testimony ties Mr.
4 Olejniczak to any of the meetings or anything that has to do
5 with the murders, so he is a natural one to be in the second
6 trial. And I'll rest on my papers.

7 THE COURT: Thank you. Mr. Eoannou?

8 MR. EOANNOU: On behalf of Mr. Willson, we'll rest
9 on our papers. Thank you.

10 THE COURT: Let me ask you, Mr. Tripi, why is it I
11 should not group Mr. McIndoo, Mr. Olejniczak or Mr. Willson
12 with that second group? And by, just so we're clear, the
13 second group I'm referring to Mr. Wood, Mr. Caruso, Mr.
14 Williams and Mr. Stacharczyck.

15 MR. TRIPI: Yes, Judge. Because, as you can see
16 from the indictment, there are certain lead up events to these
17 murders that involve Mr. Pirk taking control of the club and
18 rivalry with the sort of old-fashioned of the Kingsmen. Mr.
19 McIndoo and Mr. Willson are directly involved, as well as Mr.
20 Olejniczak, all three are directly involved in actually acts
21 related to that. Mr. Willson and Mr. Olejniczak are
22 specifically linked to this robbery and assault in the
23 Springville clubhouse on June 7th, 2013, where they, along with
24 Defendant Thomas Koszuta and others, well armed, while using a
25 mag light, beat this individual and then covered it up by

1 burning clothing, burning bloody carpet, things like that.
2 That event then triggered even more violence, more back and
3 forth between sort of the old-fashioned in terms of threats
4 back and forth and the Pirk faction and that culminates in a
5 drive by style shots fired shooting on August 3rd, 2013,
6 McIndoo and Willson are directly involved in that. So McIndoo
7 and Willson are also members of the Kingsmen Nomads, who, when
8 you're looking at the structure and the command chain for the
9 Kingsmen, the Nomads answer only to regional presidents as well
10 as the national president. So, in terms of the top down chain
11 of command, all of this related to Mr. Pirk is taking control
12 of the club and maintaining, more importantly, the control of
13 the club. So all three of them, in that regard, are aligned
14 with Mr. Pirk. Whereas, when you look at Mr. Caruso, by the
15 time the murders arrive, he wasn't even a member of the
16 Kingsmen anymore. And the other two, Stacharczyck and
17 Williams, at least were members of his same West Side Chapter,
18 which by the time the murders occurred, were closed. So there
19 is logic to trying them together because there is a lot of drug
20 evidence and firearm evidence that overlaps there, whereas the
21 violence, at some point in time, Mr. Caruso becomes a target of
22 the violence. And so the Nomads, as a group, are tasked with
23 meting that out. The there is an event an uncharged overt act
24 where Mr. Olejniczak and Mr. Koszuta and the decedent Paul Maue
25 go to the West Side clubhouse looking for him and they shot and

1 kill his dog. And Mr. Olejniczak is part of that. So both
2 charged and uncharged overt facts align Mr. Olejniczak with the
3 Pirk faction in this build up towards the murders.

4 MR. STACHOWSKI: Judge, he knows darn well that
5 Mr. Olejniczak had nothing to do with the killing of that dog.
6 That he was there, his truck was there to pick up some
7 machines.

8 MR. TRIPI: That may well be his defense.

9 THE COURT: Wait, wait, wait, you can't talk over
10 each other.

11 MR. TRIPI: That may be his defense.

12 THE COURT: Let Mr. Stachowski finish.

13 MR. STACHOWSKI: He knows that Mr. Olejniczak and
14 his own witness Koszuta told him Olejniczak had nothing to do
15 with Mr. Koszuta and he pled already and he also knows Mr.
16 Olejniczak had nothing to do with burning anything of carpets
17 or anything else out there. He knows that and yet he is making
18 representations to the Court to put him into the broader
19 conspiracy when he has never said. He is in leadership because
20 he is not he never said he is a Nomad because he never was. He
21 was just a guy that happened to come along that day and had a
22 truck and they took him to both of these, he is the gopher, and
23 that is what Mr. Koszuta will testify on the stand.

24 MR. TRIPI: I don't know how Mr. Stachowski is
25 getting that. He has a crystal ball for what people may

1 testify to, but I guess his view of conspiracy differs from me
2 and Mr. Stachowski and I'll leave it at that, Judge.

3 THE COURT: Let's hear from Mr. Pirk's attorneys
4 or attorney?

5 MR. EASTON: I have something with the grouping of
6 these trials, I think I have something to say.

7 THE COURT: I figured you did.

8 MR. EASTON: In paragraph 11 of the response that
9 was filed this morning by Mr. Tripi.

10 THE COURT: Let me find it. Okay.

11 MR. EASTON: He says severing David Pirk is not a
12 viable option. And then the critical sentence follows: The
13 main trial is his trial. And it's underlined and the emphasis
14 is in the original. In many respects, Mr. Pirk is a person
15 standing trial as a human being charged with murder and that is
16 a trial in itself. And then there is a separate trial that Mr.
17 Pirk as the personification of the Kingsmen. And that trial,
18 whether it is characterized as the main trial or not, Mr. Pirk
19 is going to be the center of gravity for that trial. We
20 understand that. And the other defendants may have issues with
21 being tried with Mr. Pirk. We have no objection being tried by
22 ourselves, that would be our preference. And the another issue
23 the Court may address at the end in terms of the severance,
24 we're pretty neutral. Other than the fact that that trial as
25 the government concedes is going to be Mr. Pirk's trial, both

1 as an individual human being charged with murder and also as
2 the personification. For better or worse, he is now an emblem
3 for the Kingsmen as an organization.

4 THE COURT: Okay. Why don't we talk about Mr.
5 Jenkins and the severance motion with respect to Mr. Jenkins?
6 Let me ask Mr. Tripi, I know there has been a lot of flurry of
7 filings after I issued my text order. But one question that
8 wasn't answered is why didn't the government, back in July or
9 even early August, file a motion to expedite Mr. Jenkins'
10 appeal? We had a telephone conference in early August, I think
11 it was, when Mr. Enix had filed an extension or request for an
12 extension of time to file objections to the R and R. And Mr.
13 Easton was on the call, Mr. Enix's attorneys were on the call,
14 and government counsel was on the call. And, at that time, I
15 thought you said to me you had talked to your appellate chief
16 and you were planning to file a motion to expedite and then
17 nothing was done.

18 MR. TRIPI: I did, and absolutely, it's absolutely
19 true when I said it. Judge, all I can say is that was the
20 expectation. Mr. Karaszewski is our appellate division chief.
21 He is tasked with all of the appeals in the office, monitoring
22 both as a supervisor as well as his own case load. And he is
23 very -- he is very diligent, so I don't want to have this
24 construed the wrong way, but I just simply believe that filing
25 that motion to expedite at that time fell off his radar,

1 proverbial radar to a degree. It certainly shouldn't be
2 construed, I'm the trial -- as an office's view point, we don't
3 want that expedited.

4 THE COURT: You'd agree with me that waiting until
5 after I issue a text order and then filing a motion to expedite
6 the oral argument, it's not the appropriate way to approach
7 this if you want to move the appeal forward.

8 MR. TRIPI: I believe two things might have been
9 at play. One is, like I said, a bit of an oversight, but No.
10 2, and there is no getting around that. I think it was a bit
11 of an oversight or miscalculation and then an oversight, but we
12 certainly want this expedited. We're now on track doing our
13 best to get it expedited.

14 THE COURT: You say you're on a track. Mr.
15 Karaszweski's motion to the Second Circuit asks that the panel,
16 as soon as possible, after the filing of all briefing on
17 December 18th, that a panel, as soon as possible, after that,
18 hear the appeal. According to my review of the Second Circuit
19 website, the first possible date that that could happen would
20 be January 3rd. In other words, there is not another panel
21 meeting until January 3rd. And so then the concept that you're
22 -- let's say the government's motion is granted by the Second
23 Circuit. The concept that you're -- let's say that you have
24 oral argument on the January 3rd, I think it's overly
25 optimistic to think you're going to get a decision from the

1 Second Circuit.

2 MR. TRIPI: Sometimes we've received summary
3 orders the next day. And we think this particular appeal is
4 that type -- this is me speaking -- that we will prevail.
5 Essentially, the only thing that the defense can even argue is
6 you got the facts wrong and under a clearly erroneous standard,
7 and our review from top to bottom in our office, that standard
8 is not going to met. And we think at least there is a descent
9 plausible chance, if we can get to the first argument date, the
10 Circuit will accommodate and render the decision in time for
11 the trial. And so the gist of maybe my reasoning is flawed,
12 but the gist of my motion and my response to you was, I guess,
13 what is the harm in waiting until that becomes clear because
14 you scheduled this trial well before anyone had any other
15 trials scheduled, and so for other people who were getting
16 trials scheduled in the meantime, they were go doing so with
17 full knowledge that you had a date certain. I've tried other
18 cases in the meantime, Mr. Cullinane has tried other cases in
19 the meantime, and has one in November with Ms. Meyers Buth,
20 that happens. That is what we do as trial lawyers. Maybe
21 there is egg on our face for not getting the motion filed in
22 July when I anticipated it would. At the same time, as I
23 pointed out, Mr. Jenkins knew full well, the day he was
24 indicted federally, that he was convicted state side. So they
25 waited nine months to file this and finalize the motion and

1 they send to it to you, red flag that a first year law student
2 could have known was abrogated and I had private conversations
3 explaining my personal circumstances and why I could not have
4 been directing the Niagara County DA's office to prosecute a
5 murder first in their backyard, I wasn't around for most of it.
6 So I don't understand, I don't understand why they continued on
7 that course --

8 THE COURT: Let's keep your voice an octave lower.

9 MR. TRIPI: I apologize. I'm just advocating, I
10 don't mean --

11 THE COURT: I know you are, but I can hear you
12 fine.

13 MR. TRIPI: I'm sorry. And so I laid it all out
14 with the expectation, maybe, erroneously, that even the
15 supplement wouldn't be pursued. I was surprised when I saw the
16 supplemental motion come out to you. But then I was even more
17 surprised to see the cherry picking that happened from the
18 state record, and the case law that there was a two-year sliver
19 of time that *Blockburger* wasn't the only law of the land and
20 those are the cases they cited. So I don't think that is fair.

21 THE COURT: Let me ask you a couple of questions,
22 and I want to hear from Mr. Jenkins' attorneys. One of the
23 questions is my understanding of Second Circuit case law is
24 that even if there was a double jeopardy issue with respect to
25 some of the counts that are charged against Mr. Jenkins, he

1 would not have an interlocutory appeal from my denial of his
2 motion to dismiss because it would not resolve the entire case
3 against him. But I haven't seen the government take that
4 position. I see Mr. Karaszewski in his motion to the Second
5 Circuit saying, Second Circuit, you have jurisdiction over this
6 appeal. I'm not sure that is correct. And so if you're not in
7 a position to respond to that right now, that is fine.

8 MR. TRIPI: Can I further respond? Honestly, I
9 need to consult, I'm not -- I don't have that.

10 THE COURT: Let me ask you a second question
11 because there is case law that neither party has cited, I know
12 Mr. Okay, I think, in his papers, raised the issue because of
13 the Hells Angels' case in front of Judge Siragusa as to whether
14 or not I still have jurisdiction because, in that case, the
15 lead defendant raised a similar argument about double jeopardy,
16 Judge Siragusa took the position in that case that that
17 divested him of jurisdiction once that lead defendant filed an
18 appeal to the Second Circuit. I don't know that that is
19 correct because my reading of the case law is that, in fact, if
20 I were to determine that Mr. Jenkins' appeal is frivolous, that
21 I don't think there is any likelihood of success, and that
22 under no reasonable view of the circumstances would he be
23 successful with it, there is case law, and I'll give you the
24 cite saying I still have jurisdiction, not only do I have
25 jurisdiction, I have every right to continue to schedule Mr.

1 Jenkins for trial and proceed with the trial even if there is
2 an appeal pending before the Second Circuit.

3 MR. TRIPI: I think that was briefly discussed in
4 my office and perhaps, perhaps, the appellate division chief
5 didn't have all of the facts of my case at his fingertips in
6 terms of every charge when it would have been appropriate.

7 THE COURT: Because, in my view, if, in fact, the
8 Second Circuit doesn't have jurisdiction of Mr. Jenkins'
9 appeal, then there is a very strong argument that the appeal,
10 at this point in time, is frivolous.

11 MR. TRIPI: Judge, can I get the cites?

12 THE COURT: You're not ready to respond to me?

13 MR. TRIPI: Can I get 48 hours to get you
14 something in writing on those specific questions?

15 THE COURT: Let me hear from Mr. Jenkins'
16 attorneys at this point, Mr. Deal.

17 MR. DEAL: I think you meant to say if the appeal
18 was deemed to be frivolous then the Second Circuit wouldn't
19 have jurisdiction.

20 THE COURT: Say that again.

21 MR. DEAL: I think you meant to say if the appeal
22 is frivolous, then the Second Circuit wouldn't have
23 jurisdiction.

24 THE COURT: Did I say it in the reverse? Let me
25 make it clear what I'm saying. In other words, I've seen case

1 law that says if there is a frivolous appeal from the denial of
2 a motion to dismiss on double jeopardy grounds, that the trial
3 court can still go forward with the trial, still even commence
4 jury selection and try the case while the appeal is pending.
5 Now, those cases, at least what I've seen at this point, all
6 seem to be cases where the motion to dismiss on double jeopardy
7 grounds was based on a declared mistrial, which, obviously, we
8 don't have here. In other words, double jeopardy did attach to
9 the state court conviction, so this is a different case.
10 However, if, in fact, the Second Circuit does not have
11 jurisdiction over the interlocutory appeal at this stage of the
12 litigation because it would not resolve all of the counts that
13 are contained in the indictment, then is there an argument, I'm
14 raising the question, I'm not saying that I have decided it,
15 but I'm raising the question, is there an argument that I still
16 have jurisdiction and still would have every right actually to
17 proceed with the trial with Mr. Jenkins even if the Second
18 Circuit is still considering this appeal?

19 MR. DEAL: Well, Judge, we would be more than
20 happy to brief that. If you're directing us to brief it, we
21 will. If you're actually directing the government to raise the
22 issue, we'll wait for it to be raised. But either way, he can
23 present an argument.

24 THE COURT: Here is where I'm coming at this from.
25 I don't think it's reasonable if, in fact, the double jeopardy

1 appeal has merit to it and there is the possibility that the
2 Second Circuit is going to resolve it at some point, in other
3 words, not decline to exercise jurisdiction, I don't think it's
4 particularly reasonable to require Mr. Jenkins' attorneys to
5 prepare for trial, even though, I appreciate the government's
6 arguments that they waited, in the government's view, too long,
7 I don't think it's particularly reasonable to have Mr. Jenkins'
8 counsel preparing for trial and what we're waiting, January
9 15th, 13th, as the Second Circuit decided or not and you wait
10 until the day from before the trial starts and cut Mr. Jenkins
11 loose, so to speak, I don't think that is a proper way to
12 manage the case. On the other hand, if I'm going to try Mr.
13 Jenkins in any event because I determine I have jurisdiction,
14 that is a different scenario. I think I need to make a
15 decision in that regard before making a determination about the
16 severance. Let me be clear about something, I don't think it's
17 appropriate or fair for all of these defendants to go to trial
18 with Mr. Jenkins and have his certificate of conviction
19 admitted. I realize there is circuit case law that allows for
20 it. I think that would be unfairly prejudicial and I would not
21 allow that to happen.

22 MR. TRIPI: We conceded as much in our papers. If
23 you were of that view, then we won't go forward with it. If he
24 is in a joint trial maybe different, if he is severed or
25 whatever in a joint trial, fine. No problem.

1 THE COURT: And so the second issue is I'm not
2 particularly persuaded by the Bruton issues that Mr. Jenkins is
3 making, especially if we're severing out Mr. Caruso and Mr.
4 Williams, I think the other issues can be cured in one way or
5 the other --

6 MR. DEAL: Right.

7 THE COURT: -- with a joint trial. So really what
8 the critical decision I have to make is what how do I go about
9 this appeal, which, at this point, may not be resolved at the
10 time we start this trial.

11 MR. DEAL: Well, again, I repeat to the Court, if
12 you want to direct the issue to be briefed, we'll brief it. If
13 you're directing the government to raise it by motion, we'll
14 wait for that and address it then, either way, obviously, this
15 is an important issue for the Court and we can address it.

16 THE COURT: Let's face it, if I sever out Mr.
17 Jenkins and try, I guess, it would be seven defendants, let's
18 say, hypothetically, say seven defendants, four defendants and
19 Mr. Jenkins' trial, I'll assume that Mr. Jenkins trial will be
20 a significant length of time.

21 MR. TRIPI: Yes, Judge.

22 THE COURT: And involve pretty much all of the
23 same witnesses that you would have, at least in one of the
24 trials, right?

25 MR. TRIPI: That would be correct.

1 THE COURT: So I do think I need further briefing
2 on this before I can resolve Mr. Jenkins' issues. Let me give
3 you the cites of the cases. I don't have the cite for the
4 Second Circuit case law that stands for the proposition there
5 is no jurisdiction by the circuit if in fact the appeal from
6 the denial of double jeopardy is not going to resolve all of
7 the counts. I'll be very up front, when I wrote the decision
8 on the double jeopardy, I wrote it anticipating Mr. Jenkins was
9 going to file an appeal, and I wrote it and I know I cited the
10 notion in there that if this isn't going to resolve everything,
11 it doesn't give the circuit court jurisdiction. I believe
12 there is a cite in the decision, but you can all find it easy
13 enough I'm sure.

14 MR. DEAL: Sure. We'll go back and look at that
15 decision for that specific purpose.

16 THE COURT: The case law for the proposition that
17 a district court may retain jurisdiction and proceed to trial
18 despite the pendency of a defendant's interlocutory double
19 jeopardy appeal, when the appeal is frivolous, and that is the
20 standard, the case is *United States vs. Millan*, 4 F. 3d 1038,
21 Second Circuit case from 1993. There is some district court
22 cases in our circuit that have adopted or proceeded along these
23 lines: *United States vs. Serrano*, 2017 Westlaw 590321,
24 Southern district of New York from February 14th, 2017. And
25 *United States vs. Torres*, 1995 Westlaw 404825, Southern

1 District of New York from July 6th, 1995. And it's based on,
2 it all seems to be based on a Supreme Court case from 1977
3 which is *Abney vs. United States*, 431 U.S. 651, 1977, where the
4 Supreme Court said, "the very nature of a double jeopardy claim
5 is such that it is collateral to and separable from the
6 principle issue at the accused' impending criminal trial." And
7 the Supreme Court specifically warned against allowing
8 defendants to use frivolous double jeopardy motions to proceed
9 as a method to bring more serious but otherwise none appealable
10 questions to the attention of the courts of appeals prior to
11 conviction and sentence.

12 MR. DEAL: I just want to make sure that I -- we
13 address exactly what you want us to address. Because your
14 decision relative to the motion didn't declare there -- it was
15 a frivolous motion. So now you want us to address whether or
16 not in fact the motion was frivolous?

17 THE COURT: No. And I didn't declare that it was
18 frivolous. I don't personally think there is merit to the
19 appeal, but that doesn't mean the same thing as saying that
20 it's frivolous. However, if, in fact, the Second Circuit
21 doesn't have jurisdiction over the appeal, then I think the
22 appeal is frivolous. In other words, if the Second Circuit
23 doesn't have the jurisdiction over this appeal because it's not
24 going to resolve, for instance, you have a premises count, Mr.
25 Jenkins is accused of maintaining a premises at the South

1 Buffalo Kingsmen chapter for use as a drug house. I don't know
2 how you could possibly argue that his state court convictions
3 could constitute a double jeopardy bar for that count. And so
4 if the Second Circuit concludes that, in fact, a resolution of
5 the double jeopardy motion, even if they disagree with me, even
6 if they say the state court convictions preclude prosecution of
7 Mr. Jenkins on some of the counts, my understanding of the law
8 is that does not give the Second Circuit jurisdiction at this
9 stage of the litigation. It's preserved until the end of the
10 trial, but because it does not eliminate the need to try Mr.
11 Jenkins, the Second Circuit doesn't have jurisdiction.

12 MR. DEAL: And I'm glad I asked the question. I
13 think what I was confusing was whether the appeal is deemed
14 frivolous or whether the motion was deemed frivolous or not can
15 be something that is decided independent of whether or not
16 there are other charges that Mr. Jenkins can be brought to
17 trial on so that to me, that is an independent analysis. Does
18 the double jeopardy, do the counts that are subject to the
19 double jeopardy motion, do they separate Mr. Jenkins completely
20 from this case if the motion was ultimately ruled in his favor
21 or are there other issues, other charges, other counts that
22 could be brought against him regardless of whether or not there
23 is a double jeopardy claim, I don't think that renders it
24 frivolous. I think that renders the Second Circuit not having
25 jurisdiction sufficient to postpone the trial.

1 THE COURT: Okay. You can make that argument. I
2 guess it's probably better if I get briefing from the
3 government first on this position. No. 1, do you view the
4 appeal as frivolous. No. 1, do you view the appeal as
5 frivolous because the Second Circuit doesn't have jurisdiction
6 or does the Second Circuit have jurisdiction because of the
7 underlying merits of the motion then I'll get a response from
8 Mr. Jenkins on it. Okay?

9 MR. TRIPI: Yes, Judge. How long would you like,
10 we'll do it as quickly?

11 THE COURT: I want to make a decision on,
12 obviously you want me to make a decision on Mr. Jenkins. I
13 would like to set a further oral argument date on this point
14 with respect to Mr. Jenkins.

15 MR. TRIPI: We could do it Monday or Friday.

16 THE COURT: Obviously you've heard the government
17 indicate that if he goes to trial in a joint trial, they're
18 going to forego, even though I guess I wouldn't allow, but
19 they're going to forego trying to pursue the trying to admit
20 the convictions in state court, but notwithstanding the fact
21 that he if he is tried by himself the, I think, the reasonable
22 likelihood, is that, particularly once the state appeal is
23 exhausted, that that would be admissible at a Federal Court
24 trial against Mr. Jenkins, that nonetheless, he would elect to
25 defer or to not be tried jointly with the rest of the

1 defendants.

2 MR. DEAL: I think, at this point, obviously, we
3 would make arguments relative to that very issue if he were
4 tried by himself. And I understand and I appreciate the
5 government's concession if he was tried with other
6 co-defendants, but I certainly wouldn't concede that it's
7 necessarily admissible if he was tried by himself having said
8 that.

9 THE COURT: Having said that, though, standing
10 right here now, you know if he is tried jointly with everybody
11 else, it's not coming in. And if he is tried by himself, there
12 is at least a chance that it may come in?

13 MR. DEAL: We understand, yes.

14 THE COURT: Okay. How is everybody's availability
15 on November 8th, which is a Wednesday.

16 MR. DEAL: I'm available.

17 THE COURT: Mr. Tripi?

18 MR. TRIPI: Yes.

19 THE COURT: Let's set it down for oral argument,
20 this issue as to -- I'm going to make a decision with respect
21 to everybody else today. It's Mr. Jenkins that we're going to
22 hold in abeyance.

23 MR. DEAL: You have a trial that day.

24 THE COURT: I do.

25 MR. DEAL: I have a client testifying. I'll be

1 available whenever you are.

2 THE COURT: We'll say 4 o'clock.

3 MR. DEAL: Sure.

4 THE COURT: We'll set it down for the argument
5 with respect to Mr. Jenkins' severance motion 4 o'clock on
6 Wednesday November 8th. If the government can submit any
7 briefing on this issue by Monday, October 30th, that works, Mr.
8 Tripi?

9 MR. TRIPI: Yes, judge, is does.

10 THE COURT: And Mr. Deal, could you get me
11 anything by when you tell me, could you do the end of the week
12 or do you know?

13 MR. DEAL: The 6th.

14 THE COURT: I'll give you to November 6th.

15 MR. DEAL: Is that enough time for the Court?

16 THE COURT: That will be enough time, that's fine.
17 So, Mr. Jenkins, you have your hand up.

18 DEFENDANT JENKINS: Yeah. Can I ask you a
19 question?

20 THE COURT: Talk to your attorney.

21 DEFENDANT JENKINS: This is just about the date
22 thing, this isn't nothing legal. You said that November 8th?

23 THE COURT: Everything is legal when you're in a
24 courtroom.

25 DEFENDANT JENKINS: I didn't mean that. Oral

1 argument at 4 o'clock, can I not be there?

2 THE COURT: You want to waive your appearance?

3 DEFENDANT JENKINS: To that one specifically.

4 Because if I come here and I'm in this courtroom at 4 o'clock,
5 I will not be able to go back to Attica prison.

6 THE COURT: What about noon, would that work
7 better for you?

8 MR. DEAL: Yes.

9 MR. TRIPI: That's fine.

10 THE COURT: I have a sentencing at 1 o'clock.
11 I'll be here on trial. We'll do noon.

12 DEFENDANT JENKINS: That was the only thing.

13 THE COURT: It's better that you're here. It's an
14 issue, it's a significant one for your purposes for this case.

15 All right. Mr. Deal, anything else that you
16 wanted to address today with respect to Mr. Jenkins. I know
17 you have the venue location issue, which I'll hear from Mr.
18 Pirk on or Mr. Easton on that.

19 MR. DEAL: Sure. You already referenced the
20 Bruton issue I'll rest on the papers and I understand what
21 you're saying and why. In terms of the change of venue issues,
22 I'll defer to Mr. Easton. And I'll accept that Mr. Tripi's
23 response that he filed this morning applies to ours, also.

24 MR. TRIPI: Thank you.

25 THE COURT: I know that you've now, though, on

1 behalf of Mr. Jenkins --

2 MR. DEAL: Just so you know, I filed that before I
3 read Mr. Tripi's response.

4 THE COURT: You're no longer seeking an order
5 under local rule 23(c).

6 MR. DEAL: I'll take Mr. Tripi's word that that is
7 how the statement came about. It came about in a detention
8 hearing and he wasn't orchestrating.

9 THE COURT: You're withdrawing that aspect of your
10 motion then?

11 MR. DEAL: Yes.

12 THE COURT: Mr. Easton, do you want to argue about
13 the location of the trial?

14 MR. EASTON: Briefly, your Honor. The papers have
15 been accumulating with the Court since the original omnibus
16 motion. The supplement was just to, first of all, make
17 reference to this is yet another Kingsmen indictment.

18 THE COURT: I know, it got assigned to me. I'm
19 aware of it.

20 MR. EASTON: And I wanted the record to be clear
21 on that that there is a third trial down the road perhaps
22 involving the Kingsmen. The gravamen of the supplement, it was
23 not, we were not asking for a gag order, although I think our
24 supplement made clear we didn't know from the article itself it
25 said these comments were made by the Assistant U.S. Attorney.

1 In paragraph 19, we said we don't know if they were outside of
2 the court or not, but, in any event, given the timing here that
3 this trial is scheduled, for a statement to get publically
4 disseminated in Buffalo and the Kingsmen and the conduct here
5 allegedly "represents organized crime at its best" and have
6 that be the front page newspaper article, and our clients in
7 the front page, and, especially, in light of the Court's ruling
8 today or the Court's ruling and the concession today that the
9 conviction of Jenkins is not going to be admissible at Pirk's
10 trial, to have that come out is uniquely prejudicial to Mr.
11 Pirk. It's not just garden-variety pretrial publicity. This
12 is unique in that he is charged with murder. In the state
13 side, Jenkins is charged with murder. Pirk is never charged
14 with murder. And now, to use that as a building block in a
15 federal murder trial, and say, well, he is guilty of ordering
16 Jenkins, and if the jury is in anyway using that to buttress
17 the government's case, it's completely -- it's completely
18 unfair to Mr. Pirk. And the remedy that we suggest is so mild,
19 to simply transfer it to Rochester. We're in the same
20 district. We're not asking like in the *Silver* case to dismiss
21 the indictment or even interdistrict, we're saying shift the
22 location and --

23 THE COURT: Let's be clear, you know, I'd like
24 nothing better than personally to try this case in Rochester.

25 MR. EASTON: I have a vested interest it as well,

1 I know the other defendants don't.

2 THE COURT: Is there any other defendant, we've
3 got defense counsel here, any other defendant other than Mr.
4 Jenkins who wants to transfer the venue any other defendant who
5 agrees with Mr. Easton that this case should be tried in
6 Rochester?

7 DEFENDANT CARUSO: Well, sure.

8 THE COURT: You're already severed, so we very
9 well may be trying your case in Rochester, Mr. Caruso. Any
10 other defendant, other than, I guess Mr. Caruso, any other
11 defense attorney that agrees with that. Nobody else wants to
12 do it. And you look at the government's argument is the
13 witnesses, the I mean, just even from a practical standpoint
14 with all of the CJA counsel involved in this case. And you're
15 not citing to -- you're citing to some Buffalo newspaper
16 articles, you're citing to a state court trial that took place
17 in 2014. You're citing to Buffalo News articles, eight
18 counties, we're going to draw our prospective jurors from and
19 I'm not quarrelling with the notion it's going to take some
20 time to pick a jury and we're going to find prospective jurors
21 that read about the case and are not able to serve because of
22 that, but these are not insurmountable challenges.

23 MR. EASTON: I understand that, your Honor. And
24 one of the purposes of the supplement was, also, to address the
25 estimates of the trial being conducted in that time period,

1 especially if it's eight and four, may be optimistic on the
2 government's part. And I think part of that is jury selection
3 is going to be, I think, difficult in light of these articles,
4 in light of this type of publicity and it may involve
5 individualized voir dire and use of questionnaires and it may
6 elongate the time and the time periods.

7 THE COURT: I pick jurors on a regular basis and
8 I'm shocked at what they don't know. And I'm shocked at what
9 newspapers they don't read. They get their news, if you want
10 to call it news, on social media and other than that, they're
11 not really invested in reading the newspaper like maybe 20
12 years ago or even 10 years ago people would have been.

13 MR. EASTON: It's hard to argue with, your Honor.
14 I think this case also there is a social media component of
15 this case that I think this type of news article in this
16 critical period before trial, I think, I think, creates issues
17 of due process and fairness. And I laid them out in the
18 papers. But, also, I think it will elongate the time, duration
19 and the difficulty in picking a jury. And, you know, I think
20 there was a little bit of heat shed in these papers, not so
21 much light, but one thing that we make pains in our supplement
22 to emphasize was, we don't what happened. Well, Mr. Tripi says
23 he did not make those statements to the press and I certainly
24 take him at his word.

25 THE COURT: You don't have to take him at his

1 word, get the transcript.

2 MR. EASTON: But it doesn't really matter. And,
3 also, Mr. Hochul did issue a press release where he said the
4 Kingsmen is a criminal front. And in the light of that type of
5 extrajudicial comment, I think the government should be aware,
6 if the media is present, they should temper their comments.

7 THE COURT: Mr. Tripi didn't win the detention
8 hearing. Judge Roemer released the defendant that you're
9 arguing should be detained.

10 MR. TRIPI: It's a contentious detention hearing.

11 THE COURT: You're going to be advocates in court
12 and it's fine to be advocates in court. I agree with you, if
13 somebody is outside of court and making comments to the
14 newspaper or the media about the case and puffing up the
15 sensationalism of the case, I agree with, that is a problem.
16 Other than the, you cite to Mr. Hochul, and you cite to the
17 initial return of the indictment, that was back in, what, 2016,
18 there is nothing that the prosecutors in this case have done,
19 as far as I'm aware, in terms of trying to drum up media
20 attention about the case. And other than the return of the
21 indictment recently, I don't think there has been anything, the
22 other indictment, recently, I don't think there has been
23 anything cited to me about this being constantly in the press
24 here or in the news media.

25 MR. TRIPI: I believe that is accurate. There was

1 an initial, when the indictment was returned, and now
2 corresponding with the new indictment, there was an article. I
3 don't recall anything else in between those two points in time.

4 MR. EASTON: Other than the press release with Mr.
5 Hochul.

6 MR. TRIPI: That was commensurate with the return.

7 MR. EASTON: No, August of 2016 on an appeal of
8 the a co-defendant.

9 MR. TRIPI: Okay.

10 THE COURT: Anything else, Mr. Easton?

11 MR. EASTON: No, your Honor.

12 THE COURT: Mr. Tripi?

13 MR. TRIPI: Judge, I'll rest on my papers.

14 THE COURT: Let's do this. Let's take a 15-minute
15 break and let's resume back here at shortly before 2 and I'll
16 let you know what I'm doing at least with respect to the
17 defendants other than Mr. Jenkins?

18 MR. MAHONEY: Judge, can I interrupt? I did
19 mention early that I may be making an application to the Court
20 specifically related to Mr. McIndoo and relates to this. I'll
21 file something, and I can file something by Thursday afternoon,
22 I don't know if that would effect your thinking on.

23 THE COURT: Explain to me what you mean. I'm not
24 totally following you.

25 MR. MAHONEY: There is something that has come up

1 that relates to Mr. McIndoo's right to present his defense with
2 respect to calling witnesses that may affect the order in which
3 individual defendants would have to be tried, so, and part of
4 that would be submitted under seal and part of it would be a
5 motion that we file, but behind that would be a motion under
6 seal and --

7 THE COURT: This is separate and apart from what
8 you communicated with my Chambers yesterday about CJA counsel?

9 MR. MAHONEY: Yes, totally different.

10 THE COURT: And the reason that you haven't
11 brought it up before today?

12 MR. MAHONEY: Just something I just learned in
13 talking to another attorney in the case.

14 THE COURT: All right. Well, I mean, I think
15 everybody wants me to make a decision today and that was my
16 intention. And I feel I have enough information. Is there
17 something you can share with me right now that you think is
18 going to influencing the decision I'm about to make?

19 MR. MAHONEY: It's something that I have to gather
20 more information on it, Judge, and I should have that
21 information by Thursday.

22 Because it's an application which the core of it
23 would be filed under seal, it's something I wouldn't be free to
24 speak on right now. What I would say now, it is somewhat
25 speculative, so I'd rather wait. I feel I would be able to

1 speak to it and address it more specifically by Thursday.

2 THE COURT: And the way that you think this is
3 going to impact Mr. McIndoo is -- can you tell me in what
4 regard?

5 MR. MAHONEY: That would require him to be tried
6 separate will from Mr. Willson.

7 THE COURT: From Mr. Willson?

8 MR. MAHONEY: Yes.

9 THE COURT: Okay. I'm going to make a decision
10 right now. And if, in fact, the decision, you subsequently
11 learn information that you feel impacts the decision that I
12 make, you can always file a motion at that point, even if it's
13 this week, and we'll hear further argument on it at that point.

14 MR. MAHONEY: All right.

15 THE COURT: Okay.

16 MR. MAHONEY: Yes, ma'am.

17 THE COURT: All right. Let's be back here at 2
18 o'clock, everybody. Thank you.

19 (Whereupon, there was a break in the proceeding.)

20 THE COURT: For the record, we're back on the
21 record. Note the presence of counsel and the defendants. So
22 Mr. Deal?

23 MR. DEAL: Thank you, Judge. Mr. Jenkins is
24 concerned about the timing of this afternoon. I was wondering
25 if he could be relieved or his presence could be excused so he

1 can get back to make head count for Attica?

2 THE COURT: Sure, we got five more minutes. I'm
3 not going to make any decisions with respect to Mr. Jenkins.
4 At this point, if you want to be excused, you are free to
5 leave.

6 DEFENDANT JENKINS: I'll stay if there is a few
7 minutes left, that's fine.

8 THE COURT: I'm ready to announce my decision. I
9 want to be reiterate that my plan is to issue a written
10 Decision and Order memorializing all of the reasons I'm
11 reaching the decision that I am. I think that with all of the
12 papers that were submitted, probably the most appropriate
13 comment was on behalf of Mr. Scanlon's attorneys where they
14 said no severance is perfect, and I think that is clear. But
15 based on my consideration of all of the various factors, I'm
16 going to sever Mr. Caruso, Mr. Williams, Mr. Wood, Mr.
17 Stacharczyck. So the main trial will be Mr. Pirk, Mr. Enix,
18 Mr. Willson, Mr. Osborne, Mr. Olejniczak, Mr. Scanlon, Mr.
19 McIndoo, and I'm reserving on an issue with respect to Mr.
20 Jenkins right now. In terms of the location of the trial, it's
21 going to be here in Buffalo. In other words, the main trial
22 will be here in Buffalo. I've been in all of your shoes before
23 in terms of being a private practitioner and you prepare a lot
24 of motion papers and then you argue before the judge and you
25 think your arguments didn't have any impact on my ultimate

1 decision. I want to assure you that that is not the case. I
2 have carefully considered all of your papers. I thought all of
3 the papers were excellent. All of the arguments were
4 excellent. And I did give further consideration. No question,
5 this is kind of the direction I was going before the oral
6 argument, but I thought long and hard about it even beforehand
7 and even after the oral argument. And I think certainly
8 reasonable minds may disagree with this outcome, but this is
9 what I think is the best resolution based on my consideration
10 of all of the factors. So, I think with respect to the
11 defendants who have been severed, unless anyone has an
12 objection, my proposal is that we set a status conference date
13 several months out. I mean, we could set another trial date at
14 this point, but I don't think that we would be talking about
15 scheduling something in the middle part of next year if not
16 later. And I'm not suggesting that we don't need to schedule
17 another trial sooner, but I just don't think at this point that
18 makes sense, unless anybody disagrees with that. Does the
19 government disagree with that?

20 MR. TRIPI: No, your Honor.

21 THE COURT: So why don't, we can set a status
22 conference date for the four defendants that have been severed
23 for -- why don't we set it for sometime in late March. Let's
24 do -- why don't we say noon on Thursday, March 29th. Any issue
25 with that?

1 MR. TRIPI: No, your Honor.

2 MR. CATALANO: No, your Honor.

3 MR. TRIPI: Your Honor, as to speedy trial, as to
4 the severed group, may I be heard?

5 THE COURT: Yes.

6 MR. TRIPI: I ask that the time from today's date,
7 be the date the Court granted the severance up to and including
8 March 29th of 2018 be excluded from the calculations of the
9 speedy trial clock as to Mr. Caruso, Williams, Wood, and
10 Stacharczyck. As this Court is aware, this case involves
11 numerous legal issues. Those issues, as to those defendants,
12 will be addressed specifically by their counsel in a run up to
13 the trial. Counsel now has access to the Jencks Act material
14 that will inform them on defense strategies and any motions in
15 limine that they will separately need to file, as it relates to
16 that follow-up trial. The protective order in place allows for
17 defense counsel to review those materials and effectively
18 prepare for that secondary trial. Obviously, defense counsel
19 will also be able to view the first trial or the main trial, as
20 it's been called here, which will also allow them to
21 effectively represent the defendants in the second trial. The
22 trial will take place in a public courtroom, and they'll be
23 able to view witnesses, some of whom may also testify in the
24 separate trial. That will allow for effective assistance of
25 counsel. Based on the record before the Court, I would ask

1 that the time from today's date to March 29th, 2018, for the
2 now severed defendants, be excluded in the interest of justice
3 and for effective assistance of counsel pursuant to the Title
4 18 U.S.C 3161 (h) (7) (A) and 3161(h) (7) (B) (4), as that exclusion
5 would outweigh the public and the defendants' interest in a
6 speedier trial.

7 THE COURT: Mr. Molloy, any objection on behalf of
8 Mr. Wood?

9 MR. MOLLOY: No. And on behalf of Mr. Pieri.

10 THE COURT: In other words, on behalf of Mr.
11 Caruso, because you're appearing for Mr. Pieri, very good.

12 Mr. Okay, any objection on behalf of Mr.
13 Stacharczyck?

14 MR. OKAY: No objection.

15 THE COURT: Mr. Catalano, any objection on behalf
16 of Mr. Williams?

17 MR. CATALANO: No, your Honor.

18 THE COURT: I do find for the reasons just stated
19 on the record by Mr. Tripi in the interest of justice, the time
20 through March 29th, 2018, should be excluded with respect to
21 the trial of Mr. Caruso, Mr. Williams, Mr. Wood and Mr.
22 Stacharczyck. I find that the interests of justice are
23 outweighed by the interests of the defendants and the public in
24 a more speedy trial with respect to those defendants, again,
25 for the reasons that were just stated on the record by Mr.

1 Tripi including the fact that it will allow all of these
2 defendants to prepare appropriately for trial, particularly
3 since the so-called main trial of this case will commence on
4 January 16th, 2018. And, therefore, pursuant to 18 U.S.C.
5 3161(h)(7)(A) and (h)(7)(B)(4), the time through March 29th,
6 2018 with respect to those defendants is hereby excluded.

7 Mr. Connors?

8 MR. CONNORS: Very quickly. I have to report to
9 Judge Arcara because I have another trial scheduled in
10 February. We have from time to time made estimates about the
11 length of the trial and I don't know if Mr. Tripi is in a
12 position to do that. We now know we have a likelihood of seven
13 defendants in the trial beginning on January 16th, are we still
14 looking at an eight to ten-week trial or less or more.

15 MR. TRIPI: I think I estimated 12 weeks or less.
16 I don't want to shrink it.

17 THE COURT: I think everybody should plan on four
18 months. That is what I'm planning on and that is what
19 everybody else should plan on.

20 MR. CONNORS: You may hear from Judge Arcara.

21 THE COURT: I'm always happy to talk to Judge
22 Arcara. All right. In terms of the defendants who obviously
23 we have a separate schedule with Mr. Jenkins in terms of the
24 defendants who are part of this so-called main trial, the
25 pretrial order that I issued has November 17, I believe, for

1 the briefing of any evidentiary issues, and December 1 for
2 various pretrial filings. We have a pretrial conference
3 scheduled for December 12. I'm anticipating we're certainly
4 going to have additional meetings after December 12, between
5 December 12 and the start of the trial on January 16th. I'm
6 happy to schedule some additional dates at this point if
7 everybody thinks that makes sense or if you think it makes more
8 sense to wait until December 12 and kind of see where things
9 stand at that point? Mr. Tripi, what is the government's view?

10 MR. TRIPI: I prefer if we wait. I think things
11 might be more in focus by December 12th.

12 THE COURT: Any objection from defense counsel to
13 that?

14 MR. DEAL: No.

15 THE COURT: Anything else from the government with
16 respect to the severance issues that we need to deal with right
17 now?

18 MR. TRIPI: Only one thing that I'll just
19 highlight. We'll be filing a motion to modify the protective
20 order as it relates to the severed defendants in terms of
21 timing and sharing since they are not going to trial.
22 Obviously, counsel, has it already and I don't think there will
23 be a need for the defendants to have back material shared with
24 that now that the trial is shared with them.

25 THE COURT: The date that they can have material

1 shared with them.

2 MR. TRIPI: December 1st.

3 THE COURT: If you can't reach an agreement with
4 defense counsel for the severed defendants and you need a
5 briefing schedule. Make sure it gets briefed before December
6 1.

7 MR. TRIPI: I will.

8 THE COURT: Anything else from defense counsel on
9 the severance issues? No? Okay. I want to address the
10 government's motion related to the Connors Firm. And I also
11 want to address an issue with Mr. Mahoney and McIndoo. Let's
12 deal with the Connors Firm issue first. But I think I don't
13 know that we need any defendants here for that other than Mr.
14 Pirk. Mr. Enix obviously isn't here.

15 MR. DEAL: Mr. Jenkins can be excused?

16 MR. STACHOWSKI: Mr. Olejniczak would like to hand
17 it to up to you, this has to do with his feelings about bail.

18 THE COURT: About bail?

19 MR. STACHOWSKI: Yes.

20 THE COURT: I'm happy to take it, but I have to
21 give a copy to the government.

22 Any issue with Mr. McIndoo being here for the
23 discussion?

24 MR. CONNORS: No.

25 THE COURT: Other than Mr. McIndoo and Mr. Pirk, I

1 think all defense counsel and defendants are excused.

2 MR. STACHOWSKI: It's talks about his health
3 issues.

4 THE COURT: Okay. I will have my chambers share a
5 copy with the government and we will decide what to do with it.

6 MR. STACHOWSKI: That won't hurt.

7 THE COURT: I'll decide what to do with it.

8 MR. STACHOWSKI: If you can send a copy to me or
9 e-mail it, but I gave you the only one we had.

10 THE COURT: Okay. All right. The record should
11 reflect that the government counsel is here and Mr. Connors and
12 Mr. Grable are here and Mr. Pirk is here as are Ms. Meyers Buth
13 and Mr. Easton, Mr. Pirk's counsel. I have the government's
14 motion that was filed at docket 822, Notice of Motion and
15 motion to clarify the record regarding potential conflict of
16 interest on behalf of Connors, LLP, which is obviously
17 representing Mr. Enix in this case. I take it, Mr. Connors,
18 Mr. Grable, you have a copy of this.

19 MR. CONNORS: We did just receive it. We haven't
20 had a chance to look at it. I was out of town.

21 THE COURT: Fair enough. But we can -- you can
22 respond to it in writing. I guess I want you to have an
23 opportunity to look at it and respond to it and then we can
24 conduct. My understanding of my obligations, I first have an
25 obligation to inquire as to whether or not there is a potential

1 conflict. And then if there is either an actual conflict or
2 potential conflict, then I have an additional obligation to
3 explore waiving the conflict. But we're not even there at this
4 point. We have to figure out if there even is a potential
5 conflict.

6 MR. CONNORS: We did talk about this at some
7 point, Mr. Tripi and I. I am aware of the issue, but I don't
8 think this is an issue. And maybe we'll put it to bed without
9 additional briefing. I don't think you need any more papers.

10 THE COURT: If you're prepared to address it now,
11 I guess the question is, did your firm, at any point in time,
12 represent anyone involved in this case other than Mr. Enix.

13 MR. CONNORS: No, essentially what happened, we
14 received an inquiry by Mr. Pirk and Mr. Enix very early on to
15 look into whether there was an investigation to the club
16 itself, the entity to see if there was any exposure for the
17 corporation and determine whether or not there was any issues
18 that might affect them. I actually put in a call to Joe Tripi
19 early on to find out information. He understandably told me
20 that he couldn't share anything with me about the entity and to
21 stay tuned and essentially nothing else came of it other than
22 that.

23 THE COURT: So did your firm represent the entity
24 or the corporation.

25 MR. CONNORS: At the time we were asked to look at

1 it on behalf the Kingsmen Motorcycle Club seeing if there were
2 any problems ranging from forfeiture or potential indictment as
3 an organization. And we looked at it. It was quiet. We
4 didn't ascertain any information from the prosecution and
5 basically we didn't pick up any confidential information that
6 would prohibit us from representing an individual when later it
7 turns out that all of the individuals were charged, not the
8 corporation.

9 THE COURT: So, did you or anyone with your firm
10 have any conversations with Mr. Pirk that you would
11 characterize as confidential in nature.

12 MR. CONNORS: We did meet with Mr. Pirk on one
13 occasion and Mr. Enix at the same time essentially asking us to
14 look out for the corporation.

15 THE COURT: And did you have any conversations
16 with any other members of the Kingsmen Motorcycle Club, other
17 than -- alleged members of the Kingsmen Motorcycle Club, other
18 than Mr. Pirk or Mr. Enix?

19 MR. CONNORS: Yes, I believe we did. Someone that
20 is not part of these charges. I believe he was, at the time,
21 he may have been an officer at the time.

22 THE COURT: And who was that individual?

23 MR. CONNORS: His name was William Piedlow.

24 THE COURT: Do you know who?

25 MR. CONNORS: William Piedlow, short conversation

1 with him. He was president at the time and had some background
2 information about the corporation.

3 THE COURT: And there was an invoice or invoices
4 issued by your firm to the Kingsmen Motorcycle Club.

5 MR. CONNORS: That is true, directly to the
6 corporation.

7 THE COURT: And the corporation paid your firm?

8 MR. CONNORS: Exactly.

9 THE COURT: And the invoice or invoices are what
10 is the subject, Mr. Tripi, of your inquiry here?

11 MR. TRIPI: I've been made aware of one invoice,
12 I'm unaware, as there are more, and as I indicated, I have not
13 looked at it has Mr. Enix's name and Mr. Pirk and the Kingsmen
14 Motorcycle Club, that is what initially made me contact Mr.
15 Connors and inquire and then obviously file this motion. I
16 believe that Mr. Connors and his firm doesn't think a conflict
17 exists. Obviously our concern, we want to make sure if people
18 are convicted and potentially sentenced to long periods of
19 incarceration that this doesn't come up down the road and
20 change, as that may change, I want to get on the record if
21 there is a potential conflict, that Mr. Enix and Mr. Pirk are
22 waiving it, if necessary.

23 THE COURT: How many invoices are there?

24 MR. CONNORS: I'm not exactly sure. I remember
25 this, though, we had a retainer and we returned a portion of

1 the retainer to the current organization hierarchy.

2 THE COURT: At any time did you view Mr. Pirk as a
3 client of the firm?

4 MR. CONNORS: No.

5 THE COURT: And fair to state you didn't view Mr.
6 Enix as a client of the firm until after your representation of
7 the corporation?

8 MR. CONNORS: That's correct.

9 THE COURT: So really the issue is was the
10 representation of the corporation, does that in any way create
11 a potential conflict, either through representation of the
12 corporation or communications that you had with alleged
13 officers of the corporation in your capacity as attorneys for
14 the corporation?

15 MR. CONNORS: I think that accurately sets forth
16 the issue. We did not talk substance with any of the
17 individuals.

18 THE COURT: I mean, it's certainly not unusual to
19 have a situation where a company is being criminally
20 investigated and then if criminal charges ultimately result,
21 that the attorney representing the company ends up representing
22 one of the officers or alleged officers of the company and then
23 other counsel is involved.

24 MR. CONNORS: It has happened a number of times in
25 my career, your Honor.

1 THE COURT: Right. I mean, from the government's
2 perspective, do you think that we need to confirm with Mr. Pirk
3 and Mr. Enix that they waive any potential conflict. In some
4 ways, I feel as though I'm a little in the dark because I
5 haven't seen the invoices. I don't know what, Mr. Connors,
6 your view is of me reviewing the invoices ex parte without the
7 government having any access to them.

8 MR. CONNORS: Let me think about that.

9 THE COURT: That's fine.

10 MR. TRIPI: There is a separate attorney in my
11 office that I'm walled off on, but, obviously, these came up in
12 the searches of various devices, so I walled myself off of the
13 generic description of it. I think having Mr. Pirk put
14 something on the record saying that he has no objection to the
15 current representation would be ultimately sufficient as long
16 as Mr. Enix was on the record. I don't perceive it to be a
17 conflict based on what I'm hearing, but at the same time, I
18 think in an abundance of caution.

19 THE COURT: I think, at best, it's a potential
20 conflict at best. And I'm not sure it's that. I guess Mr.
21 Easton or Ms. Meyers Buth, have you had any discussion with Mr.
22 Pirk about the potential conflict this creates?

23 MR. EASTON: No, your Honor, not focused as it is
24 today. We could have those conversations with Mr. Pirk. I was
25 in the dark as to the sealed submission from the government.

1 MR. TRIPI: It wasn't sealed, it was publically
2 docketed.

3 MR. EASTON: So we're not in a position to talk.

4 THE COURT: I think the most appropriate thing for
5 me to do, it doesn't strike me from what Mr. Connors has
6 described that there is any actual conflict, clearly not. It
7 also doesn't strike me that there is even the real possibility
8 of a conflict. At best, I think, as I said, there is a
9 potential for a conflict, but Mr. Connors hasn't identified any
10 confidential information that he learned in his representation
11 of the corporation that could create an issue in this case,
12 correct?

13 MR. CONNORS: That's true.

14 THE COURT: But I think the most prudent course of
15 action would be for me to confirm with both Mr. Pirk and Mr.
16 Enix, ultimately on the record, that they don't have any issue
17 with it. And I'm not comfortable with doing it with Mr. Pirk
18 until he had an opportunity to talk to you and Ms. Meyers Buth
19 about this issue. I'm assuming, and I guess if I'm asking an
20 inappropriate question, you can let me know that.

21 MR. CONNORS: I will.

22 THE COURT: I'm assuming there is a joint defense
23 agreement here?

24 MR. CONNORS: Yes. There is definitely an oral
25 joint defense agreement.

1 THE COURT: So, I mean, you know that is the
2 natural progression of these things, usually with these kinds
3 of cases. You have a the company that retains counsel because
4 there is an investigation, when the individuals get charged or
5 the company gets charged, you get additional attorneys, but the
6 initial attorney who is involved stays involved. I mean, it's
7 not as though you conducted some independent kind of
8 investigation as to the nature of the allegations here and then
9 were offering opinion to the company on that issue. Right?

10 MR. CONNORS: That's true. But even if I did
11 that, I don't think it would be a problem, but I didn't.

12 THE COURT: All right. Why don't we do this? At
13 this point, I'm not concerned. I don't have significant
14 concerns, but I do think the more prudent course of action
15 would be to have a colloquy with both Mr. Pirk and Mr. Enix on
16 the record to confirm that they do not have any concerns and
17 they've had ample opportunity to talk to their counsel about
18 any potential issue here. So we can do that today or we can
19 schedule another time for it.

20 MR. TRIPI: Judge, might I suggest, since you're
21 already having argument with Jenkins on November 7th.

22 THE COURT: No, November 8th.

23 MR. TRIPI: Maybe we can use that as the date to
24 have that. I know Mr. Enix is in Florida, that will give him a
25 date to travel here and be present.

1 THE COURT: Do you have any objection to Mr. Enix
2 appearing by video conference?

3 MR. TRIPI: No.

4 THE COURT: We can arrange for Mr. Enix to be at a
5 courthouse in Florida and appear by video conference. Would
6 that work.

7 MR. CONNORS: It would work. I know we're working
8 on a date for him to come here, it's not as soon as that.

9 THE COURT: Do you know approximately when?

10 MR. GRABLE: He will be here, he will be in court
11 on December 12th the date of the pretrial conference and he
12 will be working with us both before and afterwards.

13 THE COURT: I mean, right now, I'm supposed to be
14 here the entire month of November for a trial. So, I'm going
15 to be around. I think the more pressing issue in some ways is
16 Mr. Pirk. So what is your availability, Mr. Easton, on
17 November 8th or for Mr. Pirk?

18 MR. EASTON: I'll be out of the district, but Ms.
19 Meyers Buth would be available on that date. And I think we
20 could do it then.

21 THE COURT: That will give you enough time to talk
22 to Mr. Pirk about this and talk to Mr. Connors about any issues
23 in that regard, and we'll set this down for noon on Wednesday
24 November 8th to have a further colloquy with Mr. Pirk to
25 confirm that he doesn't have any concerns about a conflict.

1 And if there is any potential conflict, that he waives it. And
2 I think with Mr. Enix, I think we're fine waiting until
3 December 12th. I take it, Mr. Connors, your client obviously
4 is aware of the fact that that is how you initially got
5 involved in the case, and he is also aware of the work you did
6 in connection with the company, correct?

7 MR. CONNORS: Yes, very true.

8 THE COURT: Any issue with that, Mr. Tripi?

9 MR. TRIPI: Not at all.

10 THE COURT: All right. Sounds good. There is an
11 issue I need to deal with with Mr. Mahoney before we adjourn
12 for the day. Right now, you should stay here, Mr. Tripi. Mr.
13 McIndoo needs to stay.

14 Can we have Mr. McIndoo come down and sit at
15 counsel's table?

16 First of all, you filed a motion for
17 reconsideration, and I do, I'm going to set a briefing schedule
18 on that. Two weeks for the government to respond, is that
19 sufficient?

20 MR. TRIPI: Yes, Judge.

21 THE COURT: All right. You didn't ask for reply
22 papers, but where are you requesting?

23 MR. MAHONEY: I would, Judge.

24 THE COURT: So a week to submit reply papers and
25 I'll indicate in there, I'll decide whether or not we're going

1 to have oral argument based on the papers. I'll set a text
2 order setting that issue.

3 MR. MAHONEY: Thank you.

4 THE COURT: You communicated to my Chambers, and I
5 don't want to reveal any confidences, you're going to have to
6 file at least publically a motion to file under seal what you
7 communicated with my Chambers.

8 MR. MAHONEY: I thought that was done. I wasn't
9 involved in the filing process.

10 THE COURT: Nothing is on the public docket at
11 this point. All that has occurred is your office sent an
12 e-mail to Ms. Duque. You tell me, publically, what it is
13 you're requesting. I don't want to reveal anything that feel
14 should be filed under seal.

15 MR. MAHONEY: Mr. McIndoo is eligible for
16 appointment of CJA. He can no longer afford the attorney, he
17 retained us. And so on his behalf, I'm making application for
18 CJA relief for him. And basically set out that he exhausted
19 his assets or is about to exhaust the assets that he had
20 available to him for payment of counsel. And that his parents,
21 who are present in the courtroom, it turns out are unable to
22 pay for the remaining services.

23 THE COURT: All right. Mr. McIndoo, have you seen
24 the Financial Affidavit that is attached to your attorney's
25 motion papers?

1 DEFENDANT MCINDOO: Yes.

2 THE COURT: I need to have you sworn in and then
3 I'll ask you whether or not it's true. Do you want to see
4 another copy of it?

5 DEFENDANT MCINDOO: Yeah, I would like to
6 familiarize myself with it.

7 THE COURT: Let's hand this down to. All right.
8 So Mr. McIndoo, did you have an opportunity to look at the
9 Financial Affidavit?

10 THE DEFENDANT: Yes.

11 THE COURT: I'll ask my courtroom deputy to swear
12 you in. She is right here, that is Ms. Duque.

13 (Whereupon, the defendant was sworn in by the
14 courtroom deputy.

15 Mr. McIndoo, have you had an opportunity to review
16 your Financial Affidavit dated April 21? Why is it dated April
17 21, 2017?

18 MR. MAHONEY: That may have been a typo, Judge. I
19 don't know why. It should have been -- should have been
20 October 21, 2017.

21 THE COURT: Was this just recently completed? I'm
22 going to hand it back and ask you to change the date of it and
23 maybe Mr. McIndoo can initial that.

24 Did he initial it?

25 MR. MAHONEY: Yes, he did. Right there.

1 THE COURT: Mr. McIndoo, the record should reflect
2 I have in front of me a Financial Affidavit that has been dated
3 October 21, 2017. Does that include your initials?

4 THE DEFENDANT: Yes.

5 THE COURT: And that includes your signature?

6 THE DEFENDANT: Yes.

7 THE COURT: And is the information contained in
8 this Financial Affidavit accurate?

9 THE DEFENDANT: Yes.

10 THE COURT: All right. I do find, based on the
11 information contained in the Financial Affidavit that Mr.
12 McIndoo qualifies for assigned counsel. And I will assign
13 counsel. Mr. Mahoney, you've indicated your willingness to
14 continue as CJA appointed counsel, is that correct?

15 MR. MAHONEY: Yes.

16 THE COURT: Mr. McIndoo, do you desire to have Mr.
17 Mahoney continue as your counsel in this case?

18 THE DEFENDANT: Yes.

19 THE COURT: Any objection from the government?

20 MR. TRIPI: We have no position in this case.

21 THE COURT: So, I am going to appoint Mr. Mahoney
22 as CJA counsel in this case for Mr. McIndoo. In terms of
23 sorting out he already incurred fees, I agree with your
24 representations as to what Mr. Trist told you, Mr. Mahoney,
25 that you have to factor in what should have been charged under

1 the CJA rate and back that out in terms of what happens with
2 the additional assets and so forth. I guess I want to get some
3 additional guidance on that at this point.

4 MR. MAHONEY: I think either this is that hybrid
5 thing where the Court can direct payments be made into the
6 Court. We'll hold the money in escrow and put it there and
7 there is also the motorcycle, we could have the money kept
8 aside in a separate account and later let the Court supervise
9 how that is disposed of.

10 THE COURT: But you have money right now, you have
11 an excess, technically money and then a trust account money.

12 MR. MAHONEY: We have in the trust account.

13 THE COURT: You have trust account.

14 MR. MAHONEY: I think the figure on that is the
15 combination of what remains in his account and what we have in
16 our account.

17 THE COURT: I'll make a direction at this point
18 nothing be done with those assets at this stage in terms of how
19 it's going to be utilized to pay for your services. As I said,
20 I would like to get additional guidance for it before I make
21 any direction in that regard. As of right now, we'll ask for
22 and arrange for an order to be prepared, you're hereby
23 appointed as Mr. McIndoo's CJA attorney.

24 MR. MAHONEY: Thank you very much.

25 THE COURT: Anything else we need to do with from

1 your perspective.

2 MR. TRIPI: Nothing, your Honor.

3 MR. MAHONEY: No.

4 THE COURT: All right. We're adjourned. Thanks,
5 everyone.

6 * * *

7 CERTIFICATE OF REPORTER

8

9 I certify that the foregoing is a correct transcript of the
10 record of proceedings in the above-entitled matter.

11

12 S/ Karen J. Bush, RPR

13 Official Court Reporter

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